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The Madras Law Journal.

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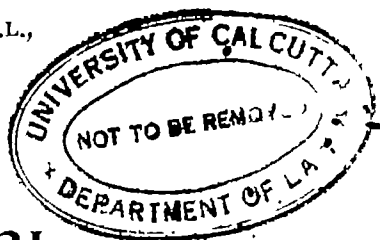
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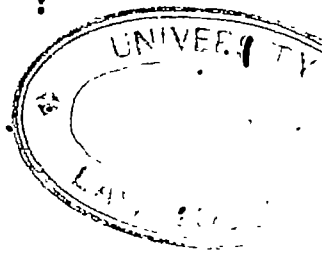
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1921

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[PART III.

HINDU LAW REFORM.

So much has been said and written recently about the codification, unification, and improvement of Hindu Law that one is apt to run away with the impression that we are on the eve of momentous changes. But closer examination is sure to disillusion one who has formed any such hasty impression. The very differences in the standpoint of the various reformers must constitute a warning to all desiring reformers as to the dangers ahead. One class of reformers urge that the Hindu Law of the texts has been, thanks to the Commentators and Judges, altered out of shape and ought to be restored to its pristine purity. On the other hand, another class protest that the case is one of arrested development that the Hindu law that was growing naturally through the Smritis, Commentaries and Nibandhas is vegetating under the sinister influence of British Courts. Yet another class think that the Law, in spite of some lapses, has been after all growing fairly satisfactorily and only a point here and a point there requires touching up. Which institution, they ask, is perfect? All these however agree that no radical change is needed in the system. But there is another class which thinks that everything is wrong with Hindu Law and the earlier it is ended the better. The last class is, however, a microscopic minority and does not seem to possess any influence in the country. The Hindu temper is still religious. The best way to foredoom to failure any attempted reform is frankly to disavow the religious sanction. In this matter, however, the Hindu Law as it is administered at present is not all of the same character. Part of it is, no doubt, based on one or other interpretation of the text of the Hindu Law but a great part is usage, and a not inconsiderable part, that which furnishes the largest scope for litigation is pure Judge-made law. The law of marriage and the law of inheritance a large part of it, belong to the first class. All the intricacies

of adoption law, the law as to manager's, father's and widow's alienations, and the law of succession to impartible estates are largely Judge-made law. These which are based on usage or are the creatures of Courts have no religious sanction and any alteration of that portion of the law cannot be obnoxious to the religious susceptibilities of the people. Most of the subtleties of the adoption law are as we have said the creature of speculation by the Courts and lawyers and nobody can have the remotest objection to having the dark points in connection with those matters cleared up. With whose authority can the widow adopt, whom should she consult, whom she may not consult, when the authority given is exhausted are all questions on which the Smriti writers throw no light but just these are questions that are causing the greatest trouble. Similarly question as to the validity of widow's surrenders, and alienations and on those questions also the legislature may well intervene and prescribe a period of time within which suits questioning the alienation should be brought on pain of losing the property entirely or lay down a procedure by which courts opinion might be taken in advance as to a proposed alienation. Even in those matters which are based purely on text law, it will not unoften be found that a progressive interpretation has been accepted by one or other of the numerous commentators. Preference shown by the legislature to one interpretation rather than to another can't wound the religious susceptibilities of any set of people. For instance several female heirs have been let in by commentators like Nilkantha and the place given to them is after the specified heirs and this interpretation may meet the wishes of the most advanced section even. Preference to male relations up to a particular point will take a long time to disappear or we cannot explain the solicitude of even educated men to have adopted sons. Most people still prefer the undivided brother's sons to their own daughter and daughter's son. Namasankirtana or family prestige is still a passion with the Indian. Care for *family prestige* is a thing not unknown in England and many an old lady, it is said will still bequeath her saving to the head of the family. Preference given to agnatic relations over cognates would however desirable be a very difficult thing to get rid of. It is doubtful if the Dayabhaga interpretation will suffice but may go some way without doing violence to the authority of the texts.

There are still many dark points about Bandhu and Stridhana succession which the Courts have got to clear up (and the Highest Court of appeal is adding to the trouble) and that work may safely be done by the legislature. But it is a matter for consideration whether the investigation by a commission on these points is likely to be less costly than actual litigation. These points are mostly decided in petty cases involving many other points and the expense can hardly ever be attributed solely to the doubtful Law of Succession. A solution this way or that if it could be attained without excessive cost may be welcome but as we have already premised, it is far from clear that it will be so. Joint family has gone in for a large amount of abuse, so also that other institution of law, son's right by birth at the hands of reformers. If these things, especially the former, is so obnoxious to the people, why should not each member declare himself divided and thus put an end to the hateful incubus. The truth is neither the joint family system nor the right by birth is an unmixed evil. The Hindu scheme of inheritance should not be taken up piece-meal and condemned. The thing should be taken up in its totality. The joint family system, the right by birth, preference of sons and female's right of maintenance should be taken together. From a purely individualistic point of view, it may be the Hindu scheme is unsatisfactory but unqualified individualism no longer holds the field. The English testators' unqualified power of disposition is, in practice, it must be remembered, considerably narrowed by the prevailing custom of marriage settlements. Excessive partition is an evil and people can be found praising the English system of primogeniture. The Hindu system is a compromise and while it provides against excessive partition, provides for all female relations that have got to be provided for by insisting upon maintenance, marriage provision, etc. None of the continental codes permit unlimited disposition without due consideration for the claim of the issue. Joint family system is as a matter of fact, a kind of mutual insurance. If it had no advantages, it is difficult to see why so many families should continue joint and so long especially when the remedy is so easily in their own hands for according to the latest pronouncements of the Privy Council, all that is needed for division in status is an unequivocal declaration

of an intention to be divided. This shows at any rate that the sentiment in its favor is strong and any hasty reformer may well take a warning therefrom not to attempt its abolition and thereby jeopardise his other and possibly more acceptable reforms. The law as to self-acquisition is no doubt in a somewhat unsatisfactory condition but it must be confessed that the question when it actually arises is settled by parties and the Courts fairly satisfactorily ; in fact there are not many cases in which the question has demanded the attention of superior Courts of the country. One thing that the educated man is clearly to realise if he wants really to effect any reform is that his influence in matters religious is slender and in fact bears little relation to his position and influence in matters secular. If he imagines that he will be able by his secular influence to affect religious opinions in the country he is suffering from a totally wrong perspective and his attempts at reform have little probability of success. Even in such matters as we have indicated above in which the religious susceptibilities have little reason to come in, it is well that the suspicion of the ordinary man is not roused, and with that view we would have the committee investigating the matter composed not only of advanced reformers but also of men about whose orthodoxy there is no question. Again, it is idle to expect that the personal law of a vast continent like India should be uniform when in a small place like the British isles there are so many differences. European analogies are obviously fallacious unless the whole continent of Europe is taken and so far as Europe is concerned, there is no uniform personal law. Japan while taking considerably from other systems of jurisprudence in respect of the ordinary law does not seem to have done so in respect of its family law and ancestral worship still plays a not inconsiderable part in Japanese history.

Dunlop Rubber Co., Ltd v Dunlop. (1921) 1 A. C 367

Practice—Service out of jurisdiction—Action for libel—Injunction—Rules of the Supreme court (Ireland) 1905, O. 11, R. 1 (g).

Under O. 11; R. 1 of the Rules of the Supreme Court (Ireland) 1905, service out of the jurisdiction of a writ of summons may be allowed by the court or a Judge whenever any

injunction is sought as to anything to be done within the jurisdiction. Plaintiff, a resident of Ireland, obtained leave, by an order made in the Chancery Division under the aforesaid rule, to serve a writ upon the defendant company which had its registered office in London, in an action for an injunction restraining the company from publishing in Ireland pictorial advertisements caricaturing the plaintiff and tendency to expose him to public ridicule.

Held, that the jurisdiction conferred by O. 11, R. 1 (g) was discretionary and since it was not shown that it had been exercised on any wrong principle, the appellate court would not interfere.

Maolaine v Gatty. (1921) 1 A. C. 376

Deed—Construction—Punctual payment—Provision for reduction of rate of interest—Estoppel.

Where a bond stipulates for payment of interest "punctually" on certain specified dates and further provides that in case the payments are so made the creditor would accept a lower rate of interest and give an extended period for payment, a payment of interest made a few days after the due dates is not a timeous payment and the creditor is not bound to accept at the lesser rate. The expression "punctual payment" is perfectly applicable to a provision for payment on a particular day and it emphasises the necessity of payment being made on that day, and not on a subsequent day. The mere fact that the creditor accepted payments of interest at the lesser rate in respect of two instalments not paid in time, does not estop him from insisting on his strict rights under the bond in case of subsequent default.

Gerrard v Crowe. (1921) 1 A. C. 395. (P. C.)

Tort—Flood in river—Erection of embankment—Injury to neighbour's land—Liability.

Defendant, a riparian owner erected an embankment on his own lands with a view to prevent their being flooded in times of flood in the river. As a result of this embankment, most of the defendant's lands escaped submersion, but the volume of water in the river increased, and therefore more

water was thrown in times of heavy flood on the land of the plaintiff, an adjoining riparian owner, than would otherwise have gone there. In an action by plaintiff for damages against defendant and an injunction. *Held* there was no cause of action for the plaintiff and the defendant was within his rights in erecting the embankment complained of.

Cases discussed.

The Kronprinsessan Margareta v. The Parana, etc. (1921) 1 A C 486.

International law—Prize—Contraband—Confiscation—Doctrine of infection—Origin and scope of the rule.

A long established rule of the law of prize, commonly known as the doctrine of "infection" condemns as if contraband goods which, though not condemnable in themselves, belong or are deemed to belong when captured to the same owner as other cargo in the same vessel, which cargo itself is liable to condemnation as contraband. Another settled rule of the law of prize is that which refuses to recognise transfers of the ownership of moveables afloat from an enemy transferor to a neutral transferee, when unaccompanied by actual delivery of the goods. The ownership of the goods at the date of capture, and not the control of them, is material for the application of the rule. The doctrine does not rest upon the personal culpability or complicity of the owner to whose goods it is applied, and is applicable although he is not privy to the contraband enterprise.

Attorney General v Cory Bros. & Co (1921) 1 A C 521.

Tort—Negligence—Nuisance—Colliery soil.—Tipping on mountain side—Escape of colliery soil—Landslide—Damages—Injunction.

A colliery company tipped a huge mass of colliery Spoil weighing several thousands of tons on the side of a hill without taking any precautions to drain the hill side and as a result there was a landslide which threatened to damage the roads and works vested in the District Council of the locality. In an action for an injunction and damages against the colliery company by the Attorney General on the relation of the District Council, the defence was that the landslide was occasioned by tension due

to a disintegration and slipping of the surface of the hill below the tips, caused by flow of water and outbreak of springs in the rainy season. *Held* that the colliery company were liable (1) on the principle of *Rylands v. Fletcher* (1868) L. R. 3 H. L. 330, for not keeping under control a dangerous and artificial structure which they had placed on the hill at their peril ; and (2) on the ground of negligence, in omitting to take proper precautions to secure the stability of the huge mass of material placed on the hill side.

In an action by the licensors of the colliery company against them for damages caused by the landslide to other property of the licensors, the colliery company were held liable on the ground of negligence.

S. S. Mendip Range v. Radcliffe. (1921) 1 A. C. 558

Practice—Concurrent findings—Not to be easily disturbed.

Per Lord Atkinson. A concurrent finding of fact by both the courts below will not be disturbed by the House of Lords unless it is clearly demonstrated that the finding is erroneous. It is not necessary that the decision of a Judge on any question of fact should be couched in any particular form of words. It is enough if he uses language which conveys the meaning that he decides the question one way or the other, and a Judge equally finds upon an issue of fact if he clearly expresses his concurrence with the decision of another Judge who has decided that issue.

Lucas-Tooth v. Lucas-Tooth (1921) 1 A. C. 594

Will—Construction—Life—Estate—Gift over—Time for ascertaining heir.

A testator, the younger son of a baronet, bequeathed his stocks and shares directing them to be divided equally between his two brothers, S. and L, for their life-time and afterwards to pass to the heir "to the baronetcy now held by Sir R L or, failing an heir, to the eldest daughter of S. *Held* on a construction of the will (by the majority, Lord Atkinson dissenting) that the heir to the baronetcy was to be ascertained, not on the death of Sir R L but on the death of the survivor of the testator's brothers S and L and there being no heirs to

the baronetcy on the death of L the survivor, the stocks and shares passed to the daughter of S according to the terms of the gift over. The well-known classification of cases by Thesiger L. J. in *Mortimer v. Slater* (1877) 7 Ch. D. 322 was not intended to be exhaustive and the rule that *prima facie* the heir is to be ascertained at the testator's death, does not apply where there is sufficient evidence of intention to show that the heir is to be ascertained at some other time.

Everett v Griffiths (1921) 1 A. C. 631

Lunacy—Pauper—Reception order—Medical Certificate—Negligence—Liability of Chairman of Board of Guardians—Judicial functions.

Plaintiff sued the defendants for damages for falsely and unlawfully certifying the plaintiff to be insane, thereby causing him to be unjustifiably incarcerated in a lunatic asylum. The plaintiff by his statement of claim alleged that the defendants certified him insane without good faith or reasonable cause and acted contrary to and in excess of their legal jurisdiction but the charge of malafides was abandoned at the trial. The first defendant was the chairman of a Board of Guardians duly empowered to make orders for the reception of pauper lunatics and he signed an order, under S. 16 of the Lunacy Act, 1860, after enquiry and upon the certificate of a medical practitioner, the second defendant, for the reception of the plaintiff as a pauper lunatic in an asylum. *Held*, that the Chairman having honestly satisfied himself as to the plaintiff's insanity at the time of making the reception order, no action for negligence lay against him and as against the medical practitioner, there was no evidence fit to be left to the jury of any want of care on his part.

Per Lord Atkinson : A Justice of the peace or duly authorised chairman of the Board of Guardians, in discharging his duties under S. 16 is acting judicially, and on that ground is protected from an action for negligence. The term "judicial" in this connection does not necessarily mean acts of a judge or of a legal tribunal sitting for the determination of matters of law, but a judicial act is an act done by competent authority, upon consideration of facts and circumstances, imposing liability and affecting the rights of others.

Hemelryck v. William Lyall Shipbuilding Co. : (1921) 1 A. C. 698

Practice—Service out of jurisdiction—Contract to be performed within jurisdiction—Breach—Rules of the Supreme Court O. 11, R. 1, (e).

Under O. 11 R. 1 (e) of the Supreme Court Rules a Court has power to grant leave to serve notice of a writ of summons outside the jurisdiction when the action is for damages for breach of a contract if there is reasonable evidence of a concluded contract and a breach of a real and substantial term of it within the jurisdiction.

Held, that where a buyer repudiated a contract for sale of ships to be delivered within the jurisdiction, but to be paid for outside the jurisdiction the refusal to accept delivery is a breach of a real and substantial term of the contract within the meaning of the above rule.

The Prins Der Nederlanden : (1921) 1. A. C. 754.

Prize—Carriage of contraband—Allowance of freight.

The Prize Court has jurisdiction to award freight in respect of the carriage of contraband goods that it will be awarded only in wholly exceptional cases. Its allowance or disallowance does not turn merely on the question whether the shipowner knew the character of the cargo.

Authorities reviewed.

JOTTINGS AND CUTTINGS.

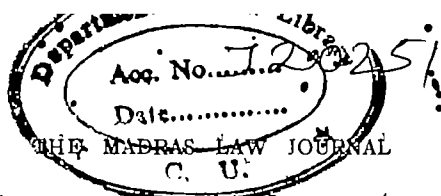
A Tenant's Right to Assign.—The usefulness of the declaratory action was well illustrated in the action of *Chatterton v. Evison* before Mr. Justice Sargant (February 18.) There are few questions on which a lawyer is more often called upon to advise than the question whether a landlord has 'unreasonably' withheld his consent to an assignment or subletting by a tenant who has covenanted not to assign or under let without the landlord's consent, 'such consent not to be unreasonably withheld.' The reason for the covenant is clear. It is to prevent the property, to the landlord's detriment, from passing into the hands of a tenant who is impecunious or otherwise undesirable. But a landlord will occasionally use his power for other purposes, and the mere



fact that a proposed assignee is unobjectionable does not necessarily make a withholding of consent unreasonable. The tenant, however, has always been in a quandary. He could not bring an action to compel the landlord to give his consent, or to pay damages in default of so doing, because the landlord had not entered into any covenant to consent in reasonable cases. That was decided by the *Treloar v. Bigge* (L. R. 9 Ex. 151). All he could do was, in the absence of consent, to assign; and, if the landlord brought an action to enforce the usual forfeiture clause, to set up that the landlord had acted unreasonably. He might succeed, as in *Lewis and Allenby, Ltd. v. Pegge* (1914), or he might fail, as in *Barrow v. Isaacs* (1891); and if he did fail, he lost his property by forfeiture. The point is, that he could not test the validity of the landlord's refusal except by taking an irrevocable step. A more excellent way has been shown in *Chatterton v. Evison*. Here a tenant wished to assign to a respectable and responsible person. The landlord—an assignee of the reversion—wished to occupy the house herself, and offered to take a surrender of the remainder of the term, and with the idea of forcing the surrender, refused to consent to an assignment. The tenant, instead of straightway assigning to his purchaser, and taking his chance of a forfeiture, brought an action against the defendant for a declaration that he, the plaintiff, was entitled to assign notwithstanding the defendant's refusal to consent. *Bates v. Donaldson* (1896) 2 Q. B. 241 was conclusive to the effect that it is unreasonable for a landlord to refuse his consent to an assignment because he wishes to have the property for his own occupation; so Mr. Justice Sargant had no difficulty in making the declaration asked for, that 'the plaintiff was entitled to assign without any licence.'—*Law Journal*.

* * *

The Lord Chief Justiceship.—Lord Reading's resignation of the office of Lord Chief Justice has now been officially announced. When, therefore, he is entertained by the Bench and Bar in the Middle Temple Hall on Tuesday the severance of his long and distinguished connection with the administration of the law in England, will be formally complete. Not that his association with the administration of justice will really be at an end. 'I have this seat,' he said at the leave-taking in the Lord Chief Justice's Court shortly after his appointment as



Viceroy of India was announced in January, 'not forsaking or abandoning the pursuit of justice, but rather pursuing it in a larger field.' And the whole profession will sincerely hope that when his term of office as Governor-General of India is completed—when, as the nation believes, the difficult task he has courageously undertaken has been successfully discharged—he will find some opportunity of taking part again in the administration of the law at the centre of the Empire. No announcement has yet been made of the appointment of the now Lord Chief Justice. The office has been the object of so much speculation of a political character during the past few weeks that it may be hoped that the appointment will be made without further delay. Persistent rumours based on 'political considerations' are calculated to impair the prestige and authority of any judicial office.—*Ibid.*

The Late Lord Moulton.—By the sudden death of Lord Moulton the English Bench has lost one of its most notable figures. His great intellectual gifts, which have been displayed in the realm of science hardly less than in the region of law, enhanced the status of the Bar whilst he practised at it, and added a fresh distinction to the Bench during the fifteen years he was a member of it. As a member of the Court of Appeal, to which he was promoted direct from the Bar in 1906, he exhibited a rare mastery of legal principles, a vigorous independence of judgment, and a refreshing freedom from technicality. These were qualities which would have enabled him to make a still deeper mark in the House of Lords if he had enjoyed a full opportunity of displaying them there. Not long after his appointment as a Lord of Appeal the war broke out, and for five years and more he rendered the nation most distinguished service as Director of Explosive Supplies in the Ministry of Munitions—a position to which he devoted his whole time with characteristic energy and skill. His death, which may be attributed in no small measure to the unsparing way in which he gave his services to the nation during the war, is a profound loss alike to the profession and the public.—*Ibid.*

CONTEMPORARY LEGAL LITERATURE.

It was held by the Divisional Court in *Davies v. Bristow* (1920) 3 K. B. 428 differing from *Hartell v. Blackler*. (1920) 2

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K. B. 161 that a landlord who has given his tenant notice to quit cannot be taken as a matter of law to waive that notice if he accepts rent accruing after the notice has expired. A conflict between the two cases has been considered by a learned writer in the April part of the current *Law Quarterly Review*. The writer considers that a part from the effect of the Increase of Rent Acts, the earlier decision represents the correct view of the law. At the outset, it is pointed out that the expression waiver of a notice to quit is inaccurate and unscientific and likely to lead to false conclusions agreeing in this respect with the judges in *Davis v. Bristow*. Strictly speaking there can be no such thing as a waiver of a notice to quit after it has once expired. So soon as the time specified in the notice has run out, the term is dead and cannot be revived. Of course a new tenancy can be created on the old terms but that requires the assent of both parties whereas the word 'waiver' the use of which is familiar in connection with "forfeiture," imports the exercise of the will of the lessor alone. The writer points out that although the expression is an inaccurate one it has had the sanction of common usage for about a hundred and fifty years. Having premised that the assent of both is necessary to create a new tenancy after the expiry of a notice to quit, the question of the effect of acceptance by the lessor of money tendered by the lessee as rent, is considered. In this case we start with an implied offer by the tenant to renew the tenancy and the only thing remaining to be proved to make the contract complete is the assent of the lessor, which is the only thing that has to be proved to establish the waiver of forfeiture. As the Court observed in *Davis v. Bristow*, the agreement to continue the tenancy must be proved. It must be shown that the parties were *ad idem* as to its terms. The only question is whether the making of such a contract is a question of fact or whether it may be question of law. Once it is found that the tenant offered the money on the terms alone of his being accepted as a tenant and the lessor took it, it is immaterial in what character the lessor intended to accept it. What he had in his mind, or said, is altogether irrelevant, for excepting the cases in which money is paid by the payer and admitted by him to be due and retained by the other person as a debt, that is to say, as an ascertained sum presently due, the rule of law that *Solutio in modo solventis* applies and for the reason that for the lessor to take the money

on any other terms would be an unlawful act and no man is to be heard to plead his own wrong. If the party to whom the money is offered does not agree to apply it according to the expressed will of the party offering it, he must refuse it and stand upon the rights which the law gives him. If the lessee lawfully attaches a condition to the payment that he makes and the lessor takes the money, the law steps in and fixes him with an agreement to that condition. As he must, *ex hypothesi*, be perfectly well aware what the terms of the payment are, he must, in so impliedly agreeing to them, be treated as being *ad idem* with the party offering them, and he is not the less *ad idem* because at the same time he endeavours to insist on other terms to which the law turns a deaf ear and refuses to pay attention. Again the retention of the money in *Hartell v. Blackler* as compensation for use and occupation is not a retention as for a debt because it is only on ascertainment that a claim for use and occupation can become a debt. Therefore it cannot fall within the exception mentioned above. The writer therefore concludes that there is a concluded agreement in *Hartell v. Blackler* and *Davies v. Bristow* and a new tenancy has therefore come into existence. He also examines the other cases bearing upon the subject and is of opinion that the preponderance of authority is in favour of his view.

The Harvard Law Review for April 1921 has a very interesting article on Psychic Phenomena and the law. In a treatment of this subject one must not approach it, assuming that all of the alleged psychic communications are fraudulent nor assume in advance that all the alleged communications are unintelligent. It would also be an error to assume that all people who entertain spiritualistic beliefs are unintelligent. Since the writings of Swedenborg it is agreed that the communications come not from the angels or demons but from human beings. Spiritualists claiming that the communications or some of them are from human beings out of the body or at least out of their own bodies. While the sceptics claim that the communications come from the minds of living persons. In determining what legal effect is to be given to spiritualistic communications believed to be genuine by the recipient, the communications should be treated for legal purposes as if the supposed communicators had still survived and made the communications. Justice and common sense require that the judge or jury should put themselves as

well as they can for this purpose in the place of the believer. The more importance is given to these communications the easier it will be to break wills or contracts made under their control. In case of a gift or a will the same questions of fraud and undue influence arise as in case of communications from persons in the flesh. There is of course an additional factor which arises where the medium acts fraudulently or in bad faith. If the recipient of the communications believes them to be genuine, a confidential situation arises similar to that of a guardian, attorney physician or spiritual adviser and gifts or legacies directly or indirectly in favour of the medium should be treated in the same manner as in the case of other confidential relations which may have been similarly abused. One of the most celebrated cases of this character is *Lyon v. Home* L. R, 6 Eq. 655, where an aged English woman adopted D. D. Home, the medium as a son and gave him great sums under the advice as she supposed of spirits. She was allowed to recover the property on account of the confidential relations between the parties. The problem of spiritualism in the making of wills is largely one of undue influence. If however the communications have not overcome the will of the testator, we are in the familiar realm of statements, suggestions, requests, and demands addressed to the testator. While a belief in spiritualism is not insanity, an actual monomania about spiritualism will avoid a will just like any other insanity which affects its provisions. After dealing with a number of aspects of this subject the writer concludes "If this article should find readers, some will undoubtedly think that there are no psychic phenomena, and this is really the only comfortable view. There may be some obscure human faculty, or more than one, at work here, just as there was in "Mesmerism," now everywhere accepted under the name of Hypnotism. The main difficulty about psychic phenomena is not with the law, but with the facts, and what is worse, the explanation of them. The law we have already."

The same number has a note on the subject, Whether the knowledge of a Director is knowledge of a Corporation. An instance is taken of a meeting of the Board of Directors of a banking corporation ; seven directors are present. The discount of a promissory note of a partnership with which the bank has had many similar transactions is before the board. The note has been signed by one of the partners on behalf of the firm as has

been customary. But the fact that the partnership was dissolved prior to the affixing of his signature is known only to two of the directors, who make no mention of it in the meeting. These two directors, with intent to serve their own interests and in disregard of their duty to the corporation, vote in favour of the discount and two of the other directors vote likewise. The other three vote against discounting the note, but the discount is made. The bank now sues the other partners upon the note. Will it be charged with knowledge of the dissolution so as to bar its recovery? In the above hypothetical case it will be noted that the directors having the knowledge of the dissolution (1) are engaged in corporate business at a board meeting, (2) do not comprise a majority of the directors present, but (3) their votes are essential to produce the corporate action of discounting the note. When the director, who has not been delegated an agent with respect to the matter in question, is present at the meeting of the board when action is taken upon the matter, and does not communicate to the board the pertinent information which he has, will the corporation be charged with his knowledge? It is clear that the mere participation of one such director in the corporate action is cause for imputing his knowledge to the corporation provided such director did not withhold the information to serve a purpose of his own. It is his duty to disclose to the board all facts pertinent to the matter before it, and the corporation should have a remedy against him for violation of that duty. It will promote more intelligent corporate action if each director realizes that his failure to impart pertinent information will be a ground for charging the corporation. Such a rule does not make the conduct of corporate business too risky, for a director will rarely fail to impart pertinent information unless he has a purpose of his own to be served. If the corporation is seeking to assert some right or title which it would not have obtained without the action of its directors, then the corporation ought to be charged with the knowledge of any single director, whose vote was essential to the directorate action, even if the director so voted, with intent to serve his own interests and in disregard of the interests of the corporation. And this should be the law, even if there is no precise analogy from the law of agency; for the relation of a corporation to those human beings in whom are vested the powers of management is a closer relation than that between one human

being who is a principal and another human being who is an agent. It would follow that, in the hypothetical case put at the opening of the note, the corporation should be charged with knowledge of the dissolution of the partnership, because the vote of the two directors who acted improperly was essential to bring about the discount. *A fortiori*, the corporation would be charged with knowledge possessed by the majority of the directors, even if they did not disclose it to the minority, and acted with intent to serve their own interests and in disregard of the interests of the corporation. The converse situation is illustrated by the recent case of *Western Securities Co. v. Silver King Consolidated Mining Co.*, where the votes of the two directors who were acting to serve their own fraudulent scheme comprised only a minority and were not essential to produce the directorate action. Their knowledge was properly held not to be imputed to the corporation.

Trial of Civilians by Military Courts in Time of Peace is one of the subjects dealt with in the same part and the article is reproduced in extenso on account of the importance of the subject.

A federal court was recently faced with the problem of the jurisdiction of a military court over civilians. The governor of Texas had suspended the local officials, declared a state of martial law, and directed the militia to maintain law and order. The defendant was fined and upon his refusal to pay, imprisoned by a military court for exceeding the speed limits fixed by ordinance. His petition for a writ of habeas corpus was denied by the federal court and the jurisdiction of the military court upheld as a proper exercise of martial law.

Martial law in its correct sense is simply the will of the military commander of a territory exercised in accordance with the usages of war. It corresponds in a way to what in France and other continental countries is called a 'state of siege.' Where it exists, the functions of the civil tribunals are or may be suspended and for the time vested in the military arm of the state. And just as the regime of the Civil Law is both preventive and punitive, so also is that of martial law. Our problem is to determine whether there is a place in our constitutional system for martial law in this sense apart from actual war.

Martial law must be sharply distinguished from the common law power of a Sovereign, sometimes called qualified

martial law, to employ all force necessary to meet opposition to the law of the land. By virtue of that power the state may in time of disturbance call upon the militia to help to maintain the orderly administration of the law by dispersing mobs, quelling riots, safeguarding life and property, and arresting and detaining persons obnoxious to the safety of the community. Indeed the proper authorities must, when the occasion arises, so use the militia. But the militia so employed is merely acting in the preventive, defensive role of martial law. The present question is whether the sovereign in time of peace can go a step further, proclaim absolute martial law, and thus authorise the militia to adopt the punitive role and subject civilians taken in custody to military trial.

In England an answer in the negative may safely be ventured. In the United States the authorities are not of one mind. On the one hand it has been held that in times of local insurrection the military summoned by the governor are in control to the exclusion of the civil authorities and that the military tribunals have jurisdiction to try and punish civilians. The reasons given are that there is a *defacto* state of war, the continued session of the civil courts notwithstanding that motives of fear or favor render the ordinary civil processes ineffective or entirely inoperative; that necessity of the situation demands summary action and justifies the temporary dethronement of the constitutional guarantees in order to hasten the restoration of the sovereignty of the laws, that in time of need executive process is due process.

On the other hand it has been held that the declaration of the governor that a state of insurrection exists in a given district does not create a new legal situation, but that it is merely the recognition of an existing state of affairs which calls for the exercise of the state's reserve police force. The militia may be called out simply to restore order, to suppress but not to punish. A riot or insurrection is not war. The existence of either does not, therefore, put the citizens of the affected area beyond the pale of the law. The authority to call troops out for police purposes and to employ any amount of force necessary to abate the disorder is adequate to meet all needs. A reasonable belief on the part of the military authorities that a man should be kept in custody during the period of disorder is a sufficient answer to a petition for a writ

of habeas corpus. If local officials fail in their duty there are legal ways for replacing them with others. If juries will not convict, a change of venue may be had. The petition of right was levelled at military trial of civilians in time of peace. Its substance is found in our federal and state constitutions, the latter often providing expressly that the military shall at all times be subordinate to the civil authorities. The governor in calling out the militia acts as the chief civil officer of the state by virtue of his constitutional power to enforce the law, but in the absence of constitutional authority he has no power to create courts which have no standing in our judicial system or to suspend the law of the land. To imply such a power would be to fly in the face of the constitutional history of England and the United States. Finally, while the decision in *Ex-parte Milligan* rests on a statute it contains a strong dictum that Military courts have no jurisdiction over civilians beyond the zone of actual war.

The validity and force of most of the arguments on either side depend upon the extent and duration of the disorder. But even if there is a very extensive and protracted insurrection it is doubtful if such serious constitutional objections could be overcome. In view of the frequency of local disturbances where the militia is called out and of the magnitude of the public interests concerned the problem involved in *United States v. Walters* is one of great importance. A decision by the United States Supreme Court upon the problem would do much to clear up a doubtful situation.

BOOK REVIEWS.

Laws Affecting the Rights and Liberties of the Indian People by NORTON AND GHOSE, PUBLISHED BY MOHAN BROS, CALCUTTA.

We are glad to announce the publication of the above volume which is almost indispensable to all politicians and lawyers interested in the development of the Indian Constitution. It gives in a handy volume a complete collection of all the acts and regulations affecting the elementary rights and liberties of His Majesty's subjects in the Indian Empire. There are also published in the appendix the various Royal Proclamations which are themselves constitutional documents of great importance. The book also gives in the end the great charters

of rights and liberties of the English people, such as the Magna Charta, the Petition of Right, the Habeas Corpus Act and the Bill of Rights. The book is specially valuable for the short introduction from the pen of Mr. Eardley Norton. There are also explanatory notes given under the sections of the various enactments wherever necessary. We cannot over estimate the value of such a collection of the laws on this subject at this moment 'when the Constitution of India is in the crucible.'

The Indian Limitation Act by Hem Chandra Mitra revised and brought up to date by B. B. Mitra 1921.

This is a handy volume giving the case law on the Limitation Act under appropriate headings under each section and article. While professing not to be a thorough and exhaustive treatise on the law of Limitation, it will undoubtedly serve the useful purpose of giving the necessary references to a busy practitioner at a glance. We believe the book has been priced comparatively low so as to place it within the easy reach of all practitioners. The get up and printing of the volume leave nothing to be desired.

Powell on Evidence 10th edition by W. BLAKE ODGERS K. C. AND WALTER BLAKE ODGERS 1921 PUBLISHED BY MESSRS. BUTTERWORTH & CO.

This is the tenth edition of a well known and authoritative treatise on the law of Evidence. The last edition was published about ten years ago and since then important statutes and decisions have affected the subject necessitating the present edition which has noted them all. It is needless for us to pass encomiums on a standard treatise except to say that this edition maintains the high traditions of its predecessors and the names of its editors are such as to inspire confidence and respect in the minds of all lawyers. We have no doubt that this work will find an honoured place in the libraries of all members of the bench and the bar.

The Code of Criminal Procedure by B. B. MITRA 1920 PUBLISHED BY RAI M. C. SARKAR BAHADUR AND SONS.

This is a valuable commentary on the subject which examines the judicial pronouncements somewhat critically. Whether one agrees with all the opinions of the editor or not they will undoubtedly stimulate thought and be in the end fruitful of good results. There are many important features of this edition to which we wish to draw the attention of our readers. In this book the editor gives numerous extracts from Police Codes, Manuals and Government Notifications which will be found highly useful in the administration of this branch of the law. The proposed amendments of the Code which have been postponed for some time have been noticed in this volume in their proper places and the editor thinks that when there is a conflict of opinion among the High Courts on a particular question and the amendment proposes to adopt one view or another the intention of the legislature may be gathered from the proposed amendment. Whether it is so or not, the giving of the proposed amendment has its own usefulness in suggesting the proper lines of development of the subject. The references to cases have been brought down to June 1920 and we have no doubt that the volume under review will be found to be of great use by the legal profession and the bench.

The Code of Criminal Procedure by ATULCHANDRA GUHA
AND NRIPENDRA KUMAR GUPTA.

We are in receipt of 3 parts of this publication which takes us up to S. 431 of the Code. The Scheme of the work is so different from the other commentaries on the code that we are not able to speak with certainty about its probable popularity or success among the members of the profession. On a glance of the publication, it looks more like a digest of the cases under each section than a treatise or a commentary. The work is not without its advantages, because it collects in their appropriate places all the decisions on a question whether uniform or conflicting, enabling the practitioner to have a comprehensive view of the effect of all the judicial pronouncements on the question. In some measure it combines the usefulness of a digest and a commentary and we hope it will be found useful to the profession in their busy daily practice.

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[PART VII.]

THE BIRTH OF LEGISLATION AGAINST COMBINATIONS OF WORKMEN.

Compulsory labour by force or fraud has been in existence in England from days of yore. Feudalism afforded only a legal perpetuation to that system. But the sudden appearance of the Great Plague, called the Black Death, towards the middle of the Fourteenth Century, followed by armed risings of the peasantry incited by the influence of Wycliffe and the preachings of his Lollard disciples, to break their old bonds throughout the whole of Western Europe, meant death to the system of bondage on the one hand and the birth of an industrial revolution on the other. In fact, that great event considerably helped labour to accomplish its purpose. Every stratum of the society was unsettled by the contemporary events and their side-issues. The classes became considerably thinned and the ranks began to yield to the spirit of the times ¹. This fact furnished the indirect cause for the abolition of the hitherto galling system of compulsory labour, while it gave a direct blow to the feudal institution which was discontinued because it involved too irksome a dependence and also because it was found to be incompatible with the idea of personal independence which now began to be keenly felt. But a fierce struggle was still maintained by the ranks so that power and prestige might not slip out of their hands.

The first legislation to punish the organization of labourers by means of combinations or confederacies dates back to the year 1349 in the reign of Edward the Third ². That date may veritably be called the starting-point of the labour-repressive legislation. The remaining years of the reign of that monarch were plentiful in legislation in restraint of trade, the liberty of

1. Indeed Professor Freeman calls the Black Death "the greatest of all social landmarks in English History". *Encyclopaedia Britannica*, Vol. VIII, p 325.

2. 28 Edw. III (1349), cc. 1 & 8.

workmen and the freedom of labourers ¹. The reigns of the succeeding sovereigns throughout a long stretch of five centuries or so only kept up Edward's repressive policy with respect to labour. History affords ample reasons for the enactment of repressive measures against labour by Edward the Third. They were in conformity with the social conditions of the times and reflected faithfully the contemporary political views. The ravages of the Black Death which followed the Famine of 1315-16 and swooped upon Great Britain at the close of 1348 from the Continent of Europe killed out half of the working classes of England. A scarcity of labour naturally ensued then and the whole organisation of labour was thrown out of gear. To this must be added the disturbing effects of the great politico-social turmoil due to the differences between the two contending reigning Houses of York and Lancaster. When the first outburst of panic was over, the sudden rise of wages consequent upon the enormous diminution in the supply of labour accompanied by a corresponding rise in the price of food-products rudely disturbed the course of industrial employments everywhere. Thereupon the fundamental law of Political Economy—the *greater the scarcity of a commodity, the more is the value to be attached to it*—asserted itself. Labour sought its own way, tried to break its old bonds and refused to work except for higher wages. And, as has been laid by Thorold Rogers : "All at once, and as by a stroke, the labourer, both peasant and artisan, became the master of the situation in England. The change was as universal as it was sudden" ². Thus began the germination of the struggle between Capital and labour which continued throughout the next five centuries or so. The Parliament not sitting then, the Crown tried to meet the situation at first summarily by means of a Proclamation which ordained : "Because a great part of the people, and principally of labourers and servants, is dead of the plague, some, seeing the need of their lords and the scarcity of servants, are unwilling to serve unless they receive excessive wages, and others are rather begging in idleness than supporting their selves by labour, we have ordained that any able-bodied man or woman, of whatever condition free or serf, under sixty years of age, not living of merchandise nor following a trade nor having of his own wherewithal to

1. 28 Edw. III (134) cc. 1-8 25 Edw. III (1350), st. 1 34.

2. J. E. Thorold Roger's *Six Centuries of Work and Wages*, 3rd Ed., p. 240.

live, either his own land with the culture of which he could occupy himself, and not serving another, shall, if so required serve another for such wages as was the custom in the twentieth year of our reign or five or six years before". That was nothing but an attempt to tie labour down again to its original bonds. But, in the natural state of things as they existed then, the attempt proved a failure as the labourers remained masters of the situation. In its discomfiture the Government called forth a fresh legislation on the subject and so, as soon as the Parliament met, Proclamation was reduced to law. And the Statute that was passed enacted as follows: "Every man or woman, of whatsoever condition, free or bond, able in body, and with the age of three score years,.....and not having of his own whereof he may live, nor land of his own about the tillage of which he may occupy himself, and not serving any other, shall be bound to serve the employer who shall require him to do so, and shall take only the wages which was accustomed to be taken in the neighbourhood where he is bound to serve" two years before the Plague broke out.¹ Refusal to obey the law was punished by imprisonment. But harsher measures were yet to come. Not only was the price of labour come to be regulated by the Parliament of 1351, but also the labouring classes were once more tied to the soil. The repeated enactment of the law against labour manifested the evident difficulty in applying it as also the stubbornness of the struggle which was evoked by the process of its application. Manumissions and exemptions which had hitherto prevailed without question were swept away on grounds of informality and labour services from which they held themselves freed by redemption were again demanded from the villeins. The attempt was all the more galling as the cause had to be pleaded in the Manor Court and to be decided by the very Officer whose interest it was to give judgment in favour of the lord. A fierce spirit of resistance is clearly indicated by the Statutes which attempted over and over again to repress labour. Combinations among workman became fiercer still according as they sought by means of them to minimize the evil effects of legislation adverse to them and to force justice from the hands of those who

¹ Both the Proclamation and the Statute were repealed formally by 3 Elizabeth cap. 4.

administered its provisions. The only appreciable result obtained from such a conflicting state of things was the further aggravation of the already over-strained relations between the employer and the employed. Strikes and combinations became still more rife in the towns where the system of forced labour was brought into play with more rigour than in the country. This was briefly the beginning of the story of coercion of capital on the one side and pauperism of labour on the other.

Fresh series of repressive ordinances, grouped under the generic term of the Statute of Labourers, were continually enacted, by Parliament after Parliament, to meet every fresh situation brought about by the resistance of labour. They virtually established a system of State Regulation thereby replacing the old customary system of feudal overlordships. The Judiciary lent its support to the Legislature and renounced its old *laissez faire* attitude. But everything proved ineffectual to keep wages to their old rates.

The first Statute, distinctly directed against a combination as such, appears to have been 34 Edward III. c. 9 (1360-1) 'an Act in which the Statute of Labourers is confirmed, altered and enforced'. After mitigating the penalty as to labourers, the Act proceeds to abolish and render null and void 'all alliances and covines of masons and carpenters, and to order that such artificer shall be compelled to serve his master, and to do every work that him pertaineth.' The Statutes that were passed against labour and trades are too numerous to be set forth in detail, but the important ones will find mention hereafter. It is sufficient to say here that all of them interfered more or less with the freedom of workmen.

It is proper that, at this stage, the chief features of the new system of State Control of Labour should be indicated. They were as follows :

- (1) the fixing of the wages of Servants, artificers and labourers by Statute (35 Edw. III. 1350, St. I. c. 1. ; 2 Henry VII, 1494, c. 22, Ss. 1-4 ; 6 Henry VIII, 1514, c. 3, Ss. 1-3) ;
- (2) the compulsion of every able-bodied man and woman under the age of sixty, not being a merchant or skilled artificer (25 Edw., III, 1350, St. I. c. 7) nor living on his own land, to serve any one who might require his or her services at the accustomed or statutory rate of wages (23 Edw. II, 1349, c. 1) ;
- (3) the placing of the enforcement of those provisions with all their

attendant regulations in the hands of the Justices of the Peace 25 Edw. III, 1350, St. I. c. 7), thus making the law of master and servant in effect, a branch of the criminal law as summarily administered.

It will be interesting to follow the extent and nature of the law primarily directed against workmen's combinations and known subsequently under the name of "Combination Laws" from the following brief enumeration.

First of all, the Statute 33 Edward I, St. I. (1305) was brought into existence in order to stamp with conspiracy "all who do confeder or bind themselves by oath, covenant or other alliance, as relates or extends to combinations or conspiracies of workmen, or other persons, to obtain an advance of, or fix the rate of wages, or to lessen or alter the hours or duration of the time of working, or to decrease the quantity of work, or to regulate or control the mode of carrying on any manufacture, trade or business or the management thereof, or to combinations or conspiracies of masters, manufacturers or other persons, to lower or fix the rate of wages, or to increase or alter the hours or duration of working or to increase the quantity of work, or to regulate or control the mode of carrying on any manufacture, trade or business or the management thereof, or to oblige workmen to enter into work". Much on the same lines was 34 Edward III, c. 9 (1360-1). The Statute 3 Henry VI, c. 1 (1425) forbade journeymen builders to form conspiracies to enhance the rate of wages under pain of felony. The 33 Henry VIII St. 1 c. 9 (1541-2) 'An Act for Servants' wages applied to Ireland only. The Statute 51 Elizabeth (1582) c. 4, Ss. 15-17, in spite of its deceptive preamble, declares that "the wages of labourers are too small, and not reasonable to these times" and speaks of the evil as "the grief and burden of the poor labourers and hired men", and, in effect, enacted a law which effectually made the wages small and 'multiplied the labourer's' grief and burden, by allowing those who were interested in keeping him poor to fix the wages on which he should subsist, and to expect a testimonial from his past employers and the overseers or church wardens when he quitted a service, which he had to show before he obtained another. The 2 and 3 Edward VI (1548) made it an offence for workmen to conspire, covenant or promise

together, or make any oaths that they should not make or do their work, but at a certain price or rate or should not enterprize or to take upon them to finish what another has begun or should do but a certain work in a day, or should not work but at certain hours and times. The 5 James I (1411) limited the fees of workmen and the price of their work in Scotland. The Statute of Edward VI was confirmed by 22 and 23 Charles II and remained in force till the whole set was repealed by 6 George IV. c. 129. The price of sick craftsman was dealt with in the Act of 7 James I (Scotland, 1413). The 5th of Mary (Scotland; 1547) dealt with the price of craftsmen's work, and of meat and drink in taverns. The 7 George I, c. 13 (1720—1) regulated the wages of tailors. The 12 George I. c. 34 (1725—6) was passed to prevent unlawful combinations of workmen employed in the woollen manufactures and for the better payment of their wages. This was followed by 3 George II, c. 34, which was, in its turn, extended by 29 George II, c. 33 (1755—6). During the reign of George the Third almost a dozen and a half of similar acts were passed prior to the year 1800, when a new law to prevent unlawful combinations was put through. Finally, 39 and 40 George III, c. 106 (1799—1800) threatened any one, who, by mere permission, should induce workmen to leave his master's service, with two months in the workhouse or three months imprisonment. It is to be observed here that the final goal of labour-repressive legislation was reached during this period.

The above enumeration of legislation adverse to Labour affords ample materials for a retrospective study. In the first place, it affords evidence of the fact that captains of industry and purchasers of labour had always kept their own self-interest in view and succeeded in getting their objects achieved owing mainly to the fact that they either propounded the legislation themselves or indirectly enlisted for themselves the sympathies of those who handled it. Although shackles were being continually forged to bind down the organisations of labour yet they proved hopelessly unavailing at the end for they failed to keep abreast with the growing expansion of the labour movements. Prosecution and punishment failed to relieve distress and remove the causes, of their widespread discontent. The state of things consequent upon such a condition could not but mean acute soreness

utter helplessness and extreme misery on the part of the labouring classes. The great factors which contributed in times to come to the broadening of the outlook on the part of employers on the one hand and to the revival of a powerful impetus on the part of workpeople on the other had not yet come into play. Naturally, therefore, the two classes of people being directly opposed to one another's interests became hopelessly estranged. Conflict of interests gave rise to struggles. The weaker and less resourceful party got worsted and courted nothing but ruin and disaster for their efforts. But all these conditions notwithstanding the law on the subject continued as inexorable as ever.

In this way is concluded the short account as to how one status system was supplanted by another, the ancient guild system having been replaced by the modern industrial system. This new status-system continued in existence till the State Regulation against Labour was broken up by fresh legislation towards the middle of the Eighteenth Century.

• • Calcutta.

Praphulla Chandra Ghosh.

(To be continued) *Vakil, High Court.*

SUMMARY OF ENGLISH CASES.

Evans v Brunner, Mond and Co, Ltd. (1921) 1 Ch. 359.

Company—Objects of association—Chemical manufacturers—Objects incidental or conducive to main object—Grant for scientific research.

A limited company formed to purchase and carry on the business of chemical manufacturers as its main object contained in its memorandum of association a clause empowering the company to do "all such business and things as may be incidental or conducive to the attainment of the above objects or any of them." The company passed a resolution authorising its directors "to distribute to such universities, or other scientific institutions in the united kingdom as they may select for the furtherance of scientific education and research the sum of 1,00,000 £ out of invested surplus reserve account." In an action by a shareholder on behalf of himself and other shareholders for a declaration that this resolution was ultra-vires the objects and powers of the company, it was found that a continuous supply of highly trained scientific men was necessary for the continued progress of the company and with

a view to ensure this supply and from this point of view the chairman and directors of the company thought it best and most advantageous to encourage a class of men who would cultivate the scientific attitude of mind and be prepared to devote their abilities to scientific education and research. *Held*, that the advantage to accrue to the company by the expenditure of this sum was direct and substantial, and not speculative or too remote and that the proposed expenditure was not ultravires the objects of the company.

Jenkin v. Pharmaceutical Society of Great Britain (1921)
1 Ch. 392.

Corporation—Charter—Powers of Corporation—Ultra vires Acts—Injunction.

Companies incorporated by statute for special purposes, and societies, whether incorporated or not, which owe their constitution and status to an Act of Parliament, having their objects and powers defined thereby, cannot apply their funds to any purposes foreign to the purposes for which they were established, or embark on any undertaking in which they were not intended by Parliament to be concerned. Corporations which are constituted by Royal Charter and do not depend for their constitution and status on an Act of Parliament stand on a somewhat different footing. A corporation created by charter can at common law do with its property all such acts as an ordinary person can bind himself to, and even if the charter expressly prohibits a particular act the corporation can at common law do the act. But if it does that which is prohibited or is not authorised by its charter, its charter may be re-called by the crown by proceedings on a *scire facias* and it is open to a member of the corporation to ask for an injunction to restrain the commission by the corporation of acts outside the scope of the charter which may result in the forfeiture of the charter and the destruction of the corporation.

Jefferson v. Derbyshire Farmers Ltd : (1921) 2 K. B. 281 (O.A.)

Negligence—Dangerous object—Duty of care—Master and Servant—Scope of employment.

A master is liable for the act of his servant in the course of his employment if the act is negligent. Whether an act is negligent or not depends on the circumstances of the case. The servant must exercise reasonable care and skill in the circum-

stances in which he is called upon to act, and this duty is more imperious when the servant is handling articles dangerous in themselves like explosives, persons etc. In dealing with these and like substances there is a special duty to take precautions that no damage shall accrue either to bystanders or to adjoining property by reason of explosion, fire, or other injury. The lessee of a motor garage employed certain servants for attending to the motor lorries kept therein. One of the servants so employed while drawing motor spirit from a drum into a tin, struck a match, lit a cigar and threw the match on the floor which was covered with petrol and oil. There was a fire which immediately spread to the motor spirit flowing from the drum and the garage and its contents were burnt down. In an action by the lessor against the lessee for damages caused by the negligence of the latter's servant. *Held* that the servant was acting within the scope of his employment but negligently without taking that special degree of caution, that was required of him and the lessee was therefore liable for the resulting damage.

Currie v. Inland Revenue Commissioners. (1921) 2 K. B. 332 C. A.

Income-Tax—Excess profits—Exception—“Profession”—Income-Tax repayment agency—Payment by commission.

The question whether a particular person carries on a “profession” within exception (c) of S. 39 of the Finance Act (No. 2) 1915, so as to exempt him from assessment to excess profits duty is one of fact to be determined by the Special Commissioners. If there is evidence on which the Commissioners could reasonably find one way or the other, and it is not shown that they proceeded on a wrong principle, the court has no jurisdiction to interfere with their finding.

Per Scrutton, L. J. :—The fact that a person is a member of an organized professional body with a recognised Standard of ability enforced before he can enter it and a recognised standard of conduct enforced while he is practising it is very material in determining whether he is carrying on a profession but is not in itself conclusive of the matter.

Jeffrey v. Bamford : (1921) 2 K. B. 351

Partnership—Legality of—Betting.

A partnership for the purpose of carrying on a betting and bookmaker's business is not *per se* illegal or impossible in law. It is open to the partnership to sue for the recovery of moneys under S. 2 of the Gaming Act, 1835 cases reviewed.

Millett v. Van Heek & Co., : (1921) 2 K. B. 369 C. A.

Damages—Sale of goods—Breach of contract—Anticipatory breach—Measure of damages.

If a contract is made for the sale of goods deliverable in the future by specified instalments as specified dates, and before the time has arrived for performance the contract is repudiated, and the repudiation is accepted, the damages have to be measured in reference to the dates on which the contract ought to have been performed. If no time is fixed for delivery of the goods, then the measure of damages is to be ascertained by the difference between the contract price and the market or current price of the goods at the time of the refusal to deliver. But this latter rule does not apply to a case where there is an anticipatory breach.

Giband v. Great Eastern Ry. Co. (1921) 2 K. B. 426 C. A.

Railway—Bailment—Deposit of goods for safe custody—Value not declared—Loss exemption from liability.

Plaintiff left his bicycle in the booking hall of a railway station and paid the ordinary cloak-room charges and obtained a ticket without declaring the value of the bicycle (which was over 5 £), as required by the rules and without paying the extra charges prescribed by the rules for articles exceeding 5 £ in value. A railway servant took charge of the bicycle but did not put it in the cloak-room with the result that the bicycle was stolen. In an action by the plaintiff against the Railway Co. for damages caused by the negligence of their servant. *Held* that the defendants were protected by the condition inserted in the *cloak-room* ticket that they would not be liable for the loss of articles exceeding 5 £ in value unless they were specially declared.

Barnett v Cohen : (1921) 2 K. B. 461.

Damages—Death caused by negligence—Suit by personal representative of deceased—Lord Campbell's Act, 1846—Depositions and verdict at coroner's inquest, if admissible—Measure of damages.

In an action by the personal representative to recover damages for the death of the deceased caused by the negligence of the defendant, it is not sufficient for plaintiff to prove that he has lost by the death of the deceased a mere speculative possibility of pecuniary benefit but he must go further and show that he has lost a reasonable probability of pecuniary advantage before he can succeed. The depositions of the evidence given in a coroner's inquisition together with the verdict and rider of the jury are not admissible in evidence in the above action as proof of the defendant's negligence.

Keyes v. Keyes and Gray : (1921) P. 204

Divorce—Domicil—Jurisdiction of Indian courts—British subjects not domiciled in India.

It is not competent to a British Indian court to decree dissolution of a marriage between parties not domiciled in India, though the marriage was celebrated and the parties were resident in India, and the acts of adultery relied on were committed within the jurisdiction of the British Indian Court.

Macdonald v. Eyles : (1921) 1 Ch 631.

Copyright—Agreement to give publisher the option of acquiring interest in future publications—Nature of—Breach of agreement—Injunction.

Where the first defendant, an authoress, entered into an agreement with the plaintiff, a publisher, for the publication of a novel already written by her and by the same agreement secured an option to the plaintiff to publish her "next three books" upon certain royalty terms therein contained and subsequently the first defendant, in breach of this agreement, arranged with the second defendant, a rival firm of publishers, to print and publish her next novel, the plaintiff sued both the defendant's for an injunction restraining them from publishing the novel until it had been first submitted for plaintiff's acceptance. *Held* that the agreement was not a contract of personal

service but was a contract by the authoress to sell the products of her labour or industry, of which the court would grant specific performance by restraining her from disposing of the novel in breach of her agreement with the plaintiff. By virtue of the agreement, the plaintiff would, upon exercising his option in respect of any of the specified books, become equitable owner of a part of, or of an interest in, the copyright thereof, and until he had exercised it he had an option to become entitled to an interest in such copyright which option he was entitled to protect against the second defendant who had notice of the plaintiff's agreement.

Bowler v. Lovegmore : (1921) 1 Ch. 642.

Contract—Restraint of trade—Restrictive covenant—Reasonableness.

As between employer and employee, it is incumbent on the employed to prove that a clause in restraint of trade in the contract of service is valid owing to the existence of some special circumstances which render it reasonably necessary for the protection of the employer's interests. Where the sole object of the clause is to prevent competition with the employer it is invalid.

Welsh Hospital (Netley) Fund, In re : Thomas v. Attorney General (1921) 1 Ch. 655.

Charity—Public subscription—Hospital for wounded soldiers—Hospital closed—Surplus assets—Cypres application.

By means of large voluntary subscriptions raised in Wales for the relief of sick and wounded Welsh soldiers in the recent war, a hospital was erected and maintained during the continuance of the war. After the conclusion of peace, the hospital was closed and its affairs were wound up. There was a surplus of some 9000 £ out of the collections and a question arose as regards the application of this sum. *Held* there was not a resulting trust of the surplus for the subscribers to the hospital but there was a general charitable intention to benefit sick and disabled Welshmen which enabled the court to apply the fund *Cypres*.

POTTINGS AND CUTTINGS.

Medical Men as Witnesses:—No member of the legal profession will be surprised at the strong stand which is being taken by the members of the medical profession against the enforced revelation in the witness-box of the confidences of their patients. At the annual meeting of the British Medical Association, which was held at Newcastle-upon-Tyne last week, a resolution was carried by what is described as an overwhelming majority calling upon the Association to 'use all its power to support a member who refuses to divulge without the patient's consent information obtained in the exercise of his professional duties, except where it is already provided by Act of Parliament that he must do so.' It was even urged that every doctor who is required to violate the professional code of secrecy should, especially in divorce and other civil cases, run the risk of imprisonment for contempt of Court by declining to obey the order of the judge. That, at any rate, would be the quickest way of getting an authoritative decision on the matter. Even the 'privilege' which, in certain circumstances, a minister of religion has come to enjoy, is a judge made privilege. 'I, for one,' said Best, C. J., in *Broad v. Pitt* (3 C. and P., 548), 'will never compel a clergyman to disclose communication made to him by a prisoner.' There were, however, other judges who adopted a different view before the privilege of ministers of religion was established. What the judges did in the case of clergymen they are equally free, in the public interest, to do, in the case of doctors. Even now the action of the judges in dealing with claims to exemption by medical witnesses is not uniform. We alluded a few weeks ago (*Law Journal*, June 18, p. 228) to the refusal by Mr. Justice Horridge to recognise the claim of a doctor to decline to give evidence in the Divorce Court to prove that one of the parties, who had been one of his parties at a clinic, was suffering from venereal disease. Another member of the medical profession has, we observe, communicated to the *British Medical Journal* the different treatment he received from another judge in the same Court.

"As a witness in the Divorce Court quite recently before Mr. Justice Hill, I applied for protection when asked a question which to answer would have been a clear breach of professional confidence; the judge at once granted the protection applied for, observing 'that he could hold the question an improper

one, but that he understood my position'; he proposed to counsel to get the information the court required in another way. It would appear, then, that there is no definite rule. Indeed, an habitue of the court told me that Mr. Justice would have 'jumped down my throat' and insisted on a reply."

The refusal to recognise the secrecy of the consulting room is all the more remarkable in most of the cases that have occurred in the Divorce Court because it has arisen in connection with a system of treatment provided by the Ministry of Health which is widely advertised as secret. If this undertaking is not to be carried out if the medical officers at the public clinics are to be compelled to disclose the information they require in their professional capacity the medical man may, in a large number of poor persons' cases, come to serve the familiar purpose which the hotel chambermaid serves as a witness in cases in which the parties belong to a different class. Public policy, which alone accounts for the privilege of solicitors and clergymen, would justify an equal measure of protection for doctors.

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Scotland and the English Bench.—At the dinner at which the Bench and Bar of England were entertained by the Faculty of Advocates in Edinburgh last Saturday—an interesting reunion which, it may be hoped, will eventually be followed by similar ceremonies in other parts of the Kingdom—Much was naturally said of the distinguished part which Scotsmen have played in the annals of the English Bench. The Lord Chancellor, who made the chief speech of the evening, remarked the House of Lords numbered amongst its members not only Lord Dunedin and Lord Shaw, 'two deeply valued Law Lords who came straight from Edinburgh to assist and enrich their deliberations,' but also Lord Haldane and Lord Finlay, who, 'realising with Scottish prudence that the competition of Edinburgh was likely to be too strong for them came to the English Bar and helped to present to them 'the welcome circumstance that four of the most conspicuous and influential members of the final Court of Appeal of the British Empire were nurtured on Scottish soil.' A considerable number of Scotsmen have occupied the office which Lord Birkenhead now adorns. Lord Erskine, Lord Brougham, and Lord Cambell are among the most famous

occupants of the Woolsack; Lord Loreburn is to be numbered with Lord Haldane and Lord Finaly among the Scotsmen who have attained the summit of the English lawyer's ambition in more recent times. To the list of Lord Chief Justices Scotland has, too, contributed one of the most illustrious of all its names. For Lord Mansfield, who was educated at Oxford, Johnson would not allow Scotland any credit. 'Much', said the Doctor to Boswell, 'may be done with a Scotchman if he be caught young.' There remains, however, the indisputable fact that he was born in Scotland and did not see what Johnson called 'the noblest prospect which a Scotchman over sees' until he was thirteen years of age. Yet another great Law Lord is to be added to the Scottish roll. Lord Watson may, perhaps, be counted foremost, among the Scottish lawyers who, in Lord Birkenhead's phrase, have 'assisted and enriched' the deliberations of the final Court of Appeal. 'Some years since,' Lord Haldane once remarked, 'when the English Bench was very strong, I asked Lord Bowen whom he took to be the greatest English lawyer upon it. He answered "Watson." And nobody who recalled Lord Watson's masterly judgments in English appeals to say nothing of Scottish and Colonial appeals was surprised to learn from Haldane what so fine a judge as Lord Bowen of other judges held to be true. The Lord Chancellor remarked that, unlike Greece, but like Rome Scotland had "the legal mind." Apart from the great lawyers who, being born in Scotland, have 'assisted and enriched' the deliberations of the Scottish courts, a sufficient number of Scottish lawyers have won distinction in the English courts to justify Lord Birkenhead's saying.

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Breach of Promise and the Law:—Mr. Justice McCardie, who is greatly given to pointing the moral of his judicial labours, has been commenting at the Birmingham Assizes upon the attitude of the law towards a lover who changes his mind. This is what the learned judge said in his summing-up in a breach of promise case in which the jury was not deterred from awarding the plaintiff 100*£*. damages:

I have dissolved a great many marriages in the Divorce Court, and I have come to the conclusion that more than half of the divorces were caused because the parties did not entertain real affection one for the other. Yet when a young man says

before marriage, 'I have changed my mind,' an action for breach of promise is brought against him.

It is no doubt, because of the blackmailing purposes to which the action for breach is put that not a few eminent lawyers have sought to restrict it. Some forty years ago the late Lord Herschell and Lord James of Hereford, who were then members of the House of Commons, invited the House to declare that 'the action for breach of promise ought to be abolished, except in cases where actual pecuniary loss has been incurred by reason of the promise, the damages being limited to such loss.' The motion, which did not commend itself to the House then, might obtain a larger measure of support now. Probably, however, such a motion would have to make seduction, as well as pecuniary loss, a ground for damages before it had a real chance of acceptance. If ever the law of breach of promise were altered without making seduction a ground for damages, the necessary alternative would be to change the anomalous law of seduction, under which the right of action belongs not to the girl who has been injured, but to her parents, who have to prove that they have suffered damage by reason of the loss of her services. The existing law, both as regards breach of promise and seduction is from any point of view, unsatisfactory, and a serious attempt to amend it ought speedily to be made.

CONTEMPORARY LEGAL LITERATURE.

The Journal of the American Institute of Criminal Law and Criminology has a contribution on the possibilities and methods of increasing parental responsibility for juvenile delinquents. A very hopeful field of approach to the science of penology is in the work of juvenile delinquents. The career of the ordinary delinquent offender is to a large extent governed by the conditions surrounding his youth. The prevention of delinquency in youth is of greater importance and, of course, holds more promise of accomplishment than its cure. Every writer on the subject will admit that the influence of parents or custodians having children in their charge is one of the controlling factors in the development of the child's character. There are numberless cases of delinquency resulting from bad environment or careless or unintelligent control amounting in many

cases to positive wrongdoing on the part of those who are responsible for the bringing up of the youth of the community. The law has long recognised the liability of the owner or keeper of an animal for all damages occasioned by its depredations.

.. The animal having no initiative or responsibility of its own, the blame for its act is transferred entirely to its owner. How much different is the situation where children, belonging to a parent, cause expense or damages to the community? A parent voluntarily undertakes the duties of marriage and parenthood. The law gives him the control, custody and right to the earnings of the child until its majority, and likewise imposes upon him the duty to support, educate and maintain the child. The child has some mentality and some responsibility differentiating it from the case of the animal. If we relieve a child from responsibility because of its insufficient or inadequate training up must we not transfer the responsibility to those persons who are in turn responsible for the state of facts which predisposed him to delinquency? When one considers the tremendous amount of delinquency which has directly resulted from parental neglect, it seems somewhat strange that society has not heretofore been willing to proceed directly to the source of the trouble. There is more truth than fiction in the graphic story of O. Henry's in which the shiftless father not wishing to be bothered to entertain his daughter sends her into the street. When a few years later she is brought before the heavenly tribunal for the murder of her lover at an east side dance hall, she is summarily discharged and the celestial bailiff is commanded to descend to the earth and bring up "The Guilty Party".

The American Law Review for March-April 1921 has a contribution on Compulsory Sex Hygiene and examination. The following regulations have been passed with a view to go about more thoroughly, more rapidly and more effectively the varying forms of social diseases in a state university in the United States. "That two hours of instruction in individual group and inter group hygiene be required of all members of the Freshmen class; that three hours of physical education be required of all Freshmen and Sophomores; and that all Freshman shall stand a physical examination under the resident physician provided for in this appropriation." Each college of the University has been requested to allow credit towards its

degree for the above work. These regulations are being put into effect. The writer opposes the system and says that sex education is desirable but the natural and the best place for it is in the home. It is difficult for sex instruction in college to escape being futile and harmful most students as various students now are instructed before they enter college. Sex education must be adapted to the period of psychic and sex development of the individual taught, or it is harmful. But cases of precocious or belated development of sex consciousness and impulses are more frequent than in any other important aspect of development. If a young man is in need of sex instruction beyond the capacity of his parents, the family doctor is by far the best instructor and monitor. Some people may insist that students do not mind a forced examination for venereal disease and are strangers to the feelings of modesty. The best answer to this attitude is that to deprive students of legal rights, if they do not strenuously object is bad training for good citizenship. The defenders of forced physical examination may contend that the mental anguish arising from violated modesty is based on prudery but here we are confronted by a condition of things and not a theory. The horror of nakedness is an indisputable product of christianity. Then the writer deplores the developments in the constitution of the united states on were lives as follows.

During the past few years our constitutional form of Government has been subjected to assaults that almost have overcome it. Chief among these disintegrating influences have been centralization of power of the federal government, the encroachment upon the residuary sovereignty of the states, the disregard of constitutional limitations, the constant and successful assaults upon personal liberty, and the development of a socialistic sentiment that would reduce life to a sheer materialistic basis under the comoufflage of idealism. One by one the hand of an increasingly paternalistic government has taken away our ancient liberties, until the right of privacy, the inviolability of the person, is among the few that are left. Now, by a forced physical examination of every Freshman, regardless of probable consequence believing him a source of infection, it is proposed to take away this remaining right, the protection of one's spiritual nature and the modesty that hundreds of years of civilization have developed.

Each surrender of the constitutional right brings us nearer to socialism and hence says the writer, the question whether we should compel all Freshmen to submit to a physical examination is really the question whether we should hasten or retard the advent of socialism. Approaching the question from the point of view of its legality he says that the examination of a person for venereal disease without reasonable cause upon sworn complaint and warrant is illegal and an invasion of the rights of citizens under the constitution and laws of the land, and the higher right of the freedom of his mental determination of that which to him constitutes the most sacred right. It cannot be justified on the ground that it is not attempted to require this examination of the man on the street but it is merely a condition precedent to attending the state university. A student has the option to submit to a fee for religious or sectarian purposes or to stay away from a state school. Yet a regulation forcing him to this option is unreasonable. It deprives him of a legal right ; for it says, in effect you cannot attend the university not because of some wrong or lack of preparation on your part, but because you are insisting upon a constitutional right which can never be wrong and which courts protect. The authorities of public schools cannot require of students as a condition of attendance what the legislature cannot directly require. "It is not claimed that a student may not be examined for venereal disease. It is asserted that he cannot be examined against his will without a valid search warrant ; and what the legislature cannot do the officials of a public school cannot do. No school regulation can violate the law or deprive students of constitutional rights. The right of search for venereal diseases under a warrant both protects society and guards the citizen from official oppression. The system of compulsory sex hygiene and examination already is in operation. Its fate rests with the people. Is it to be approved ? Is it to be extended ? Each man is responsible for his own acts and omissions only. If he condones what he reprobates, with a weapon at hand equal to his defense, he is responsible for the results. Has he then such a weapon ? It is believed that the law provides him with one forged in the slow fires of the centuries, and to day tempered in his hands."

BOOK REVIEW.

The Law of Income Tax by E. M. KONSTAM, K. C. 1921.

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This new treatise on the subject of Income Tax has to be specially welcomed because the author has treated the subject in language as singularly free from the lawyers' technique as possible and in a manner quite intelligible to the lay public. The work does not suffer on that account in its usefulness to a lawyer and all questions on income Tax law are fully discussed and the author has expressed his own opinions on the various questions and the judicial pronouncements thereon. The treatment of the subject is not by way of commentaries to the Income Tax Acts in which case it will only be useful to the tax lawyer who is already familiar with the subject and the contents of the enactments. On the other hand, the book gives a continuous and self-contained account of the law of income tax for the information of the tax payer and the lay public. We may say that we agree with the author in thinking that such a work should be undertaken, because the obscurity of the Income Tax Acts has become a bye word and the importance of the subject is really very great. The work is of special value to us in India because the value of English precedents on the law of income tax has been recently affirmed by the Madras High Court in *Chief Commissioner of Income Tax (Board of Revenue) Madras v. North Anantapur Gold Mines Ltd.* (44 M. 718) although the Board of Revenue questioned their value and usefulness in this country. The Income Tax Acts are given as appendix to the work and the index is full and accurate. We would unhesitatingly recommend this work to the use of tax payers and their advisers.

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[PART XII.

HEADS OF RELIGIOUS ENDOWMENTS : THEIR LEGAL POSITION.

[SRI VIDYA VARUTHI THIRTHA SWAMIGAL v. BALUSAM I
AYYAR. 41 M. L. J. 346.]

The judgment of the Privy Council in the recent case noted above, is in spite of its apparent elaborateness, clear and decisive only on the question of limitation. Their Lordships hold that the head of a religious institution in this country is not a 'trustee' in the English sense or within the meaning of Art 134 of the Indian Limitation Act and that the property under his charge cannot be regarded as conveyed to or vested in him in that sense. With reference to Art. 144, they reject the plea that the invalidity of an alienation by such head makes the alienee's possession *ab initio* adverse and this is put on the ground, that the alienation will endure for the grantor's life-time. On other aspects of the legal position of such a person, the decision throws little new light but on the other hand, seems calculated to create doubts and difficulties from the way in which several topics are touched on and numerous cases referred to, or extracted from, without any positive expression of opinion.

Taking for instance the Madras cases, the decisions in *Sammantha Pandara v. Sellappa Chetti* ¹, *Gyana Sambanda v. Kandasami*, ², *Satyanama v. Saravanabaga* ³ *Vidyapurna v. Vidyaindhi* ⁴, *Kailasam Pillai v. Nataraja* ⁵ and *Muthusamier v. Sri Methanilthi Swami* ⁶ are successively referred to, in the course of the judgment, but beyond the disapproval of the resort to foreign analogies in Vidyapurna's case, we find nothing in the judgment to indicate which of the different shades of legal conception suggested in these cases has their Lordships' approval. We are unable to think that they considered all the decisions reconcilable or all the theories therein

1. (1881) I. L. R. 2 M. 175.

3. (1898) I. L. R. 18 M. 266.

5. (1910) I. L. R. 33 M. 265.

2. (1887) I. L. R. 10 M. 375.

4. (1904) I. L. R. 27 M. 435.

6. (1918) I. L. R. 38 M. 356.

suggested sound. In *Sammantha Pandara v. Sellappa Setti* ¹ and *Gyana Sambanda v. Kandasami* ² the court described the property of a mutt 'as in a certain sense trust property, though the superior has large dominion over it'. The Full Bench decision in *Kailasam Pillai v. Nataraja* ³ does not purport to differ from these cases, but it is clear that while the referring Judges read them in one sense, the Full Bench read them differently. Wallis, J. was prepared to accept the conclusions arrived at in Vidyapurna's case. The Officiating Chief Justice thought that understanding the several passages referred to in the light of their context, the Judgment in Vidyapurna's case could easily be reconciled with that in the earlier cases. Sankaran Nair J. said that in *Gyana Sambanda v. Kandasami* ² it was possible to trace the history of the institution and the evidence there established specified enforceable trusts; but, where such evidence was not available, he held, that the very indefiniteness of the purposes on which the income might be or ought to be spent showed that there was no enforceable trust. All the three learned judges agreed in holding that in respect of what may be called the general properties of a mutt, the head of the mutt is neither a trustee nor a life tenant, but none of them thought fit to lay down anything positive and left everything to be decided on the usage and custom of the particular institution. The result of the judgment was that in the absence of positive evidence proving a specific trust in the particular case, the head of the mutt was not liable to be sued under S. 539 of the Civil Procedure Code of 1882 (now S. 92) and this part of the decision was confirmed by the Privy Council (though without any enlightening discussion) in *Nataraja v. Kailasam Pillai* ⁴.

In the present judgment however, their Lordships also refer with approval to the observations of Lord Shaw, in *Ram Prakash Das v. Anand Das* ⁵ where dealing with the ownership of mutt property, he described the Mahant as the owner but added that his ownership was generally in trust for the institution itself. And they themselves recognise the existence of a trust 'for general pious or religious purposes' (as distinguished from a 'specific' trust) and say that while the head of a mutt may not be a trustee in the English sense of the term, he is answerable as a

1. (1881) I. L. R. 2 M. 175.

2. (1887) I. L. R. 10 M. 376.

3. (1909) I. L. R. 33 M. 265.

4. (1920) 47 M. L. J. 98 P. C.

5. (1916) I. L. R. 43 C. 707.

trustee in the general sense for mal-administration.' But what is the proceeding in which he can be called upon so to answer? For, apart from the authority of *Nataraja v. Kailasam Pillai* ¹ it is now possible to contend that if the head of a mutt is not a 'trustee' within Art 134 of the Limitation Act, there is no trust within the meaning of S. 92 of the Civil Procedure Code either—because, that section having been substantially adopted from Lord Romilly's Act, the word 'trust' there should also be understood in the sense it bears in the English law. And this contention can be put forward even by Dharmakarthas of temples, for according to the present judgment they too are not trustees in the English sense. We are aware that in *Chidambaranatha v. Nallasiva* ² a representative suit on behalf of the Thambirans was recognised as an appropriate proceeding to impeach an alienation of mutt property by the Pandarasannadhi, but the Judgment there rests on a line of reasoning which will equally support a suit under S. 92 C. P. C. (See also *Arunachella v. Velappa*) ³. In view of the language of the present judgment, we may also expect the question to be raised whether S. 10 of the Limitation Act applies to suits against Matadhipatis or Dharmakartas or their representatives.

The reference to *Satyanaama Bharati v. Saravana Baga Anmal* ⁴ is by no means useful, for there the facts were peculiar. Both the courts found on the evidence that subject to certain specific trusts the surplus income was granted for the maintenance of the grantee and his descendants. In *Sethuramaswamiar v. Meruswamiar* ⁵, there was little more than a mutt in name, all the courts having found that the properties had been granted to the guru (who was not an ascetic) in his individual capacity and accordingly constituted ordinary partible properties in the family. These cases can furnish no safe analogy in dealing with the ordinary class of mutts.

Mahomed v. Ganapati ⁶ did not relate to a mutt, but reference is made to it in the present judgment as dealing with the powers of managers of religious institutions generally. The particular passage quoted therefrom, especially when read in the light of their Lordships' observations with reference to Art 144 is calculated to revive a question which had hitherto

1. (1920) 39 M. L. J. 98.

3. (1915) 28 M. L. J. 410.

5. (1917) I. L. R. 41 M. 296.

2. (1917) I. L. R. 41 M. 124.

4. (1895) I. L. R. 18 M. 266.

6. (1890) I. L. R. 18 M. 277.

been regarded here as fairly well settled viz. the rule of limitation governing suits to recover temple property improperly alienated by a trustee.

Dealing with such a suit, the learned Judges in *Mahomed v. Ganapati* ¹ applied a rule which had been laid down in connection with claims to service inams—viz. that successive holders of an office enjoying for life the property attached to it are entitled to question the dispositions made by their predecessors and that time runs against the successor not from the date of the disposition but from the date of the predecessor's death when only the successor became entitled to possession. This principle was applied by the High Court in *Velu v. Gnana Sambanda* ² to a suit by a son to recover the office of hereditary trustee as well as the trust properties from an alienee who had obtained a conveyance thereof from the plaintiff's father. But the Privy Council in *Gyana Sambanda v. Velu* ³ reversed this decision and the rule was thereafter restricted to cases, in which the holder of the office for the time being was entitled to the beneficial enjoyment of the property. (See *Kanalalthammal v. Krishna Pillai*) ⁴. In *Abhiram v. Goswami's* ⁵ case the Judgment speaks of the property as having been granted to an idol but in *Narasaya v. Venkatramana* ⁶ the Madras High Court explained that decision as well as that in *Iskwar shyam Chand v. Ram Kanai Ghose* ⁷ as resting on the assumption that the manager of the institution had a personal interest in the alienated property.

Their Lordships' present Judgment and the apparent approval of *Mahomed v. Ganapati* ⁸ would seem to take away the basis of the restriction above referred to. We must however mention in this connection that in *Damoodar Das v. Lakshan Das* ⁹ where a subordinate mutt and its properties had been alienated by a mahant and his successor claimed them on the ground that they belonged to an idol of which he was the trustee, the Judicial Committee held that the alienee's possession was from the date of the alienation adverse to the right of

1. (1890) I. L. R. 13 M. 277.

2. (1895) I. L. R. 19 M. 243.

3. (1899) I. L. R. 23 M. 271.

4. (1910) 20 M. L. J. 781.

5. (1909) I. L. R. 36 C. 1003.

6. (1912) 23 M. L. J. 260.

7. (1910) I. L. R. 38 C. 526.

8. (1890) I. L. R. 18 M. 277.

9. (1910) I. L. R. 37 C. 885.

the idol and that the bar of limitation was not avoided merely by the fact that the successor brought the suit within 12 years of his succeeding to the office.

The view now adopted, that a permanent lease or other invalid alienation by the head of a mutt will endure for the grantor's lifetime seems almost to assimilate his position to that of a life tenant or a person with such an interest in the income as does not make him accountable for his use of it. Otherwise it is difficult to see how a transaction that is single and entire and *ex hypothesi* not binding on the institution can be split up and held to be good for the duration of the grantor's lifetime (See *Narasayya v. Venkatramana* ¹). Their Lordships indeed go further and hold that in the case of a lease the transaction can be affirmed by the succeeding Matadhipathi for the duration of his lifetime, so as to give a fresh starting point for limitation at his death. And it is logically possible for this process to continue, so as indefinitely to postpone the commencement of limitation. Whether the same thing can happen in respect of transactions other than a lease it is difficult to say. That the alienee's possession does not become adverse during the alienor's lifetime was assumed in *Abhiram Goswami's* case and was decided in *Mutlusamier v. Sri Melhanithi* ² which their Lordships refer to with evident approval. The decision proceeded on the theory that the income from the mutt properties is, subject to the upkeep of the mutt, *at the absolute disposal* of the Matadhipati for the time being. And in the course of the present judgment also it is observed in passing that so long as a mohant does not spend the income in wicked living or in objects wholly alien to his office he has full powers of disposition over it. But this view seems to us less rigorous than, if not even difficult to reconcile it with the express pronouncement of the Board in *Arunachalam Chetti v. Venkatachalapati* ³ to which no reference is made in the present judgment. The property there was held not to have been granted for any specific purpose but to form part of the endowment of the Mutt, though its possession and management had for a long time been in the hands of the Chetti Nagarathars. The courts in India had declared the head of the mutt to be entitled to draw the surplus income of the village but in reversing this

1. (1912) 23 M. L. J. 260.

2. (1913) I. L. R. 38 M. 356.

3. (1919) I. L. R. 43 M. 253.

direction, their Lordships say, 'It is the duty of a trustee to refrain from the personal enjoyment of such surplus and to add the same to the capital of the estate, to be administered and this law also applies to the property of a mutt or asthal, and that whether the title to the same is in the gurukkal as spiritual head of the institution or is in trustees like the chettis in the present case. (See also *Basudeo Roy v. Mohant Jugal Kishwar Das* ¹).

SUMMARY OF ENGLISH CASES.

Moore and Co. and Landaver and Co. : *Inter se* (1921) 2 K. B. 519 (Q. A.)

Sale of goods—Breach of warranty or condition—Mode of packing—Breach as to part of the Contract—Right to reject the whole—Sale of Goods Act (1893) S. 30 Sub. S (3).

Under a contract for the sale of certain quantity of canned fruits from Australia the goods were stated as being in cases containing thirty tins each: The sellers tendered the whole quantity ordered but one half of the cases contained only twenty four tins each while the remainder contained thirty tins each. The buyers refused to take delivery of the whole consignment. *Held* that there was a sale of goods by description, and as the goods contracted to be sold were mixed with goods of a different description the buyers were entitled to reject the whole consignment. (1921) 1 K. B. 73 affirmed.

Merhens v. Home Freeholds Co. (1921) 2 K. B. 526 Q. A.

Damages—Building contract—Breach—Liability—Measure of damages—Impossibility of performance, when a valid defence.

In the case of a contract for the building of a house if the defendant breaks it after partially erecting the structure, the proper measure of damages is what it cost the plaintiff to complete the house substantially as it was originally intended and in a reasonable manner at the earliest moment he was allowed to proceed with the work, less any amount that would have been due and payable to the defendant by the plaintiff had the defendant completed the house at the time agreed by the terms of his contract.

A person is not entitled to take advantage of circumstances as a frustration of the contract if he has brought about those circumstances himself.

¹. (1918) 35 M. L. J. 5 (P. C.).

Verschures Creameries v Hull and Netherlands Steamships Co. (1921) 2 K. B. 608 C. A.

Damages—Conversion—Waiver of tort—Contract—Election of remedies—Loss of goods.

Plaintiffs, the owners of certain goods delivered them to forwarding agents to be carried by sea to a port and thence forwarded to a customer in an inland town. When the goods arrived at the port the owners instructed the forwarding agents not to deliver them to the customer but the goods were nevertheless delivered to him. The owners thereupon sued the customer and recovered judgment against him for the price of goods sold and delivered and then, failing to get satisfaction, sued the forwarding agents for negligence and breach of duty. *Held* that the plaintiffs having elected to treat the delivery to the customer as authorised and recovered judgment on that footing could not turn round and treat it as a misdelivery and sue the forwarding agents in tort.

Oshellew v. Royal Commission on the Sugar Supply : (1921) 2 K. B. 627.

Shipping—General average—Claim for—Liability of cargo owner to contribute—Loss of ship and cargo—Effect of.

Where subsequent to a shipowner's incurring a general average expenditure, the ship and all her cargo are totally lost, the shipowner cannot recover any contribution in general average from the owners of the cargo so lost.

Hummerstone v. Leary : (1921) 2 K. B. 664.

Practice—Joinder of two defendants—Prima facie case shown—Collision—One defendant dismissed from action at close of plaintiff's case—Procedure.

As the result of a collision between a motor-lorry and a motorcar, plaintiffs who were passengers in the lorry sustained injuries and brought a suit for damages, making the owners of both the vehicles defendants. There was a *prima facie* case of negligence on the part of the driver of one or other of the vehicles. The plaintiff's evidence appeared to make it probable that the driver of the car rather than the driver of the lorry was to blame, but they could do no more than state what they observed just before the collision occurred. Their evidence did not conclusively or affirmatively show that the driver of

the lorry was not to blame. At the close of the plaintiff's case counsel for the owner of the lorry submitted there was no evidence against him and the trial judge took this view and dismissed that defendant from the action. *Held* on appeal, that as a state of facts was proved by the plaintiffs from which the reasonable inference to be drawn was that *prima facie* one if not both, of the defendants was negligent, the trial judge should not have dismissed the first defendant, the owner of the lorry, from the action at the close of the plaintiff's case, but should have heard the case fully against both the defendants before coming to a decision.

Baker v. James : (1921), 2 K. B. 674.

Negligence—Master and servant—Defect in motor car supplied to servant—Defect known both to master and servant—Injury—Servant's right to recover damages.

The relationship between master and servant normally places upon the master the duty of care towards his servant. The master may be liable for a danger or defect causing hurt to his servant not only where he knew but where he ought to have known it. The negligence may be either (a) where he knows and negligently fails to remedy, or (b) where he ought to have known but negligently fails in acquiring knowledge and therefore negligently fails to remove the danger or defect. The mere fact that a servant knows of the defect or damages does not debar him from claiming damages for injury through his master's negligence. Knowledge of a danger or defect on the part of the servant is evidence, but only evidence, of an agreement by the servant to take the risk upon himself. It does not of itself debar him from remedy.

Mahmoud and Ispahani In re : (1921) 3 K. B. 716 C. A.

Contract—Illegality—Contravention of—Statutory rules—Enforcement of contract.

The Court will not lend its aid in order to enforce a contract entered into with the view of carrying into effect anything which is prohibited by law. Where there is a contract for the sale of goods which may be used either for a lawful or for an unlawful purpose, and the vendor at the time of the sale knows that they are going to be used for that unlawful purpose, the rule

the claimant or of his father or mother. But as Mr. Justice Sadasiva Aiyar rightly points out—where or how the sister's son or one's own descendants come in (they undoubtedly have got to come in) is not stated either in the judgment of the Privy Council or in the Judgment of the Calcutta Full Bench *Umaid Bahadur v. Udaichand*.¹ The next case dealing with the same subject is *Adit Narayan Singh v. Mahabir Prasad Tiwari*.² There the contest was between the mother's sister's grandson and the mother's paternal aunt's son. Their Lordships hold that the former is entitled to preference. Their Lordships state the effect of earlier decisions to be that the right of succession amongst the three classes viz. Atma Bandhus, Pitri Bandhus and Matri Bandhus is governed by the propinquity of the class i.e. to say that the Pitri Bandhus succeed in default of Atma Bandhus and Matri Bandhus succeed only in default of the Atma Bandhus and the Pitri Bandhus. Mother's sister's son, they say, is an Atma Bandhu. The word "sons" in a similar context has been construed in a generic sense and has been held to include a grandson and in any case the grandson of mother's sister falls within the general description of an Atma Bandhu and is not to be excluded only because he is not mentioned among the illustrations in the text of the Mitakshara. The rival claimant was only a Pitri Bandhu and was postponed. The rule in preferring the nearer to the more remote class of Bandhus, is not dependent on individual propinquity or in the efficacy of offerings. What the rule of succession as between the Bandhus of the same class is, it was not necessary for their Lordships to decide.

That question fell to be decided in the case under review. The contest there was as between the maternal uncle and the paternal aunt's son's son. Their Lordships prefer the maternal uncle. Their Lordships meet the criticism of Sadasiva Aiyar J. suggesting that the sister's son and the maternal uncle come within the class of Atma Bandhus. Their Lordships disapprove of the rule laid down in *Balusami Pandithar v. Narayana Rao*.³ That as between Atma Bandhus those ex parte paterna are to be preferred to those ex parte materna. They approve of the propositions enunciated in *Muthusami v. Muthukumarasamy*.⁴, the only

1. (1890) I. L. R. 6 C. 119

2. (1921) M. W. N. 153.

3. (1897) I. L. R. 20 M. 342.

4. (1892) I. L. R. 16 M. 23.

relevant proposition however being the fourth *viz.* that as between members of the same class, spiritual benefit they confer on the propositus is a ground of preference. At the same time they refer without disapproval to the rules laid down by Sirkar shastry and Professor Sarvadhikari. Shastry's rules are: (1) the nearer in degree on whichever side is to be preferred to one more remote (2) of those equal in degree those on the father's side are to be preferred to one related on the mother's side (3) when the side is the same the circumstance of one being related through a male and another through a female makes no difference. Sarvadhikari states that in a case of contest between two members of the same class and of the same degree equally remote, the question of efficacy of oblations "determines the preferable right". Their Lordships' approval may be taken to go so far as to hold that nearness of blood and spiritual efficacy are grounds of preference, because their Lordships refer to the nearness of degree of the maternal grandfather and his superior spiritual efficacy as the governing facts in the case. What is to be the rule as between the descendants of the propositus and the descendants of his father whether at all the fact of their descent from him should be a ground of preference there is no *indication* in the case. There is no indication as to whether even in such a case the degrees are to be the governing factor. The effect of the decision is to leave the whole matter at large leaving ample scope for litigation.

applicable is the same as that where the contract is *ab initio* unlawful. If the contract be rendered illegal, it makes no difference, in point of law, whether the statute or Statutory rule which makes it so has in view the protection of the revenue or any other object.

Winfrey and Chatterton's Agreement, *In re* ; (1921) 2 Ch. 7.

Landlord and tenant—Covenant against assignment without license—License not to be unreasonably withheld by lessor—Grounds for refusal.

A lease provided that the tenant was not to assign, underlet or part with the possession of the house leased without the consent of the landlord, which consent however was "not to be unreasonably withheld in the case of a respectable and responsible person." The purchaser of the reversion from the landlord wanted to occupy the house himself and alleged a bargain with the tenant for the purchase of the house, but the tenant denied it. The tenant assigned her interest to a respectable and responsible person, but the purchaser of the reversion refused to consent to the assignment. *Held* that it was not open to the landlord or his assignee to withhold consent to the assignment in order to enable him to regain possession of the premises before the expiry of the term. The object of the clause was to protect the landlord from having his premises used or occupied in an undesirable way or by an unsuitable tenant or assignee and not to enable the lessor to coerce, if possible, the tenant to surrender the lease so that the landlord might obtain possession of the premises.

Brough v Nettleton (1921) 2 Ch. 25.

Part performance—Parol Contract of letting with option to purchase premises—Entry into possession—Right to specific performance—Statute of frauds.

Plaintiff sued for specific performance of an alleged verbal agreement whereby defendant agreed to grant to him the tenancy of a house for a term of $2\frac{1}{2}$ years at an annual rent of 27 £. 10 Sh. with an option of purchasing the house for a price stated at any time during the tenancy on giving the defendant notice of his intention to do so. Defendant pleaded the Statute of Frauds in defence. It was found that defendant had allowed

plaintiff to enter into possession of the house, well knowing that he was doing so on the faith of the verbal agreement which had been come to between them. The defendant had at that time in his possession a document signed by the plaintiff in which the terms of that agreement were fully set forth, and there was no doubt in his mind as to either the exact terms or as to the belief. *Held* that the taking of possession of the house by the plaintiff constituted an act of part performance of the agreement and the defendant was precluded from setting up the Statute. The effect of the removal of the barrier set up by the statute was to open the door to parol evidence of the whole agreement, including the term as to the option to purchase.

Ponder *in re* : Ponder v. Ponder : (1921) 2 Ch. 59.

Administration—Administrator—Power of Court to appoint trustees.

An administrator who has paid all expenses and debts and cleared the intestate's estate stands in the same position to the next-of-kin as an executor who has cleared the estate stands in towards the residuary legatee. In either case the Court can appoint a new trustee to act jointly with him.

Sun Building Society v. Western Suburban Building Society : (1921) 2 Ch. 83

Building society—Powers of directors—Contract of sale—Directors acting honestly—Ultra vires—Specific performance.

A building society is not a trustee of its funds for its members, and its directors are not fettered by the rules applicable to ordinary trustees as to the nature of the securities which they may invest upon, but have a large discretion as to the time when, and the circumstances under which, they ought to invest the funds of the society. Mere imprudence or want of judgment as to the time of investment, and as to the funds available for investment, cannot be said to amount to gross negligence. If the directors of a building society acting honestly, entered into a contract to purchase the mortgage securities of another building society in liquidation and the vendors who acted *bona fide* sued to enforce specific performance of the contract. *Held* that the objection that the transaction if it proved unprofitable, might involve the directors of the defendant society in an action for damages for

misfeasance or breach of trust in respect of their statutory duties, was no ground for refusing the plaintiff specific performance of the contract even if the directors had committed some breach of duty in entering into it.

JOTTINGS AND CUTTINGS.

Child Adoption and Legitimation.—Few subjects of social reform are more urgent, or less contentious, than the question of making legal provision for the adoption of children in this country, and the legitimation of natural born children per subsequents matrimonium, as is the case in Scotland, as well as in most Continental countries. The time has long been ripe for such legislation, and as the recently issued Report of the Departmental Committee appointed by the Home Secretary last year shows (Cmd. 1254), there is a general concurrence of testimony that the practice of adoption has grown extensively, and is likely with the increased interest in child welfare, to grow still more. There is, however, also evidence that adoption without definite legal sanction has already been accompanied in many cases by serious evils, and so it becomes a matter of urgency to regularise the practice and provide the proper safeguards. The Report of the Committee presided over by Sir Alfred Hopkinson, K. C. is a valuable contribution to the subject, and it should help materially to the initiation of the necessary measures in Parliament. It shows, for instance, that while the adoption of children does receive legal recognition in almost all civilised States, the laws of most Continental countries, are, to a large extent, based on ideas with regard to the family and other social conditions which differ in important respects from those that obtain here at the present time. But, on the other hand, the development of the system in English-speaking countries begun in the State of Massachusetts in 1851, since extended throughout the American States, and adopted in most of our Dominions, has led to what may be called an Anglo-Saxon type of Child Adoption, which we could at once put into practice. Only the necessary machinery is wanting, and to the consideration of this a large part of the Report is devoted. The Committee are of opinion that some sanction for adoptions being required under all systems, that sanction should be given by a regular judicial authority rather than by an adminis-

trative department or local authority ; that the authority of the tribunal must necessarily be one readily accessible, and that the choice of tribunal being, therefore, between Courts of Summary Jurisdiction and the County Courts, the latter are to be preferred. The reasons for this choice are interesting, and we think convincing: (a) the importance of having one class of tribunal dealing with adoption throughout the whole country; (b) the desirability of keeping the sanctioning of agreements for adoption away from the atmosphere of criminal courts; (c) the facility of making provision for the recording of orders which may affect property as well as personal rights. It has been the policy of the Legislature in recent years to extend the jurisdiction of the County Courts, and assign new subjects to them, but this is, in reality, no new head of jurisdiction, for already by the Guardianship of Infants Act, 1886, jurisdiction has been given to the County Courts, concurrently with the High Court, to deal with questions relating to the custody of infants, and under the more recent Workmen's Compensation Acts, the County Court judges exercise important discretionary powers affecting the welfare of families and the care of infant defendants. Rules would have to be made affecting methods of procedure, consents of parents or guardians, preliminary investigations as to adopters, the making of interim orders preceding adoption, subsequent inspection and report, the registration of adoptions, and provisions for revocation; and all this could be done through the existing machinery of 'the People's Court.' But the main thing is to lay down by statute the general conditions which should be fulfilled before adoption can be sanctioned, to define the effects of adoption after sanction has been given, and to determine upon what grounds revocation should be permitted. That can only be done by the Legislature; and it should not be impossible in such a matter as this to get an agreed measure through Parliament even in the present congested state of public business. Law Journal June. 1921.

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The New Chief Justice of the United States. So great a part does the Supreme Court play in the constitution of the United States that the appointment of Mr. Taft to the office of Chief Justice is of interest far beyond the limits of its jurisdiction. It is not merely that he affords yet another instance

of an ex-President of America becoming the occupant of a great judicial office. The records of our own Empire are not without comparable instances. To mention but one, Sir Edmund Barton, who was the first Prime Minister of the Australian Commonwealth, became one of the principal judges of the High Court of Australia. Here in England, too, there has recently been a marked tendency towards statesmen becoming judges; Lord Cave and Sir Henry Duke both passed direct from the Cabinet to the Bench. The main reason why the appointment of Mr. Taft is so welcome to English Lawyers is that he is a great constitutional and international lawyer, who has proved that he regards the Rule of Law as something far higher than the enforcement of a mere municipal code, who has shown that he reverences the great principles of the Common Law on which American as well as English justice is based, and who has been among the foremost champions of the League of Nations, by which alone the Rule of Law can effectively be applied to international affairs. English lawyers congratulate their American brethren upon the appointment of a great lawyer to a great office. *Ibid.*

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Lawyers at the Imperial Conference.—It is sometimes complained, with more acrimony than judgment, that English lawyers take too large a part in our national affairs. Those who make this complaint ought to extend the area to which they intend to apply it. The qualities which have enabled members of both branches of the legal profession to take a conspicuous part in public life in England have also enabled their Colonial brethren to achieve the highest positions in all parts of the Empire. At the opening sitting of the Imperial Conference on Monday five Prime Ministers were present, and four of them Mr. Lloyd George, Mr. Arthur Meighen, Mr. Hughes and General Smuts have been practising lawyers. The legal profession may legitimately take a special pride in an Imperial Conference at which the Prime Ministers of England, Canada, Australia and South Africa are all to be counted among its members. *Ibid.*

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Judges and the Bar. In commenting upon the Attorney-General's recent acknowledgment in the House of Commons of the truth of the statement that, in consequence of the inade-

quacy of their present salaries, certain occupants of the Bench are thinking of returning to the Bar, we stated that there was both old and modern authority for the view that an occupant of the Bench does not lose his status as a member of the Bar. The old authority is provided sufficiently by Macaulay's statement that Pemberton, who was one of the counsel at the trial of the seven Bishops, had in the time of Charles II been Chief Justice of the King's Bench, and, being removed from his high place on account of his humanity and moderation, had resumed his practice at the Bar. The modern authority is supplied by the modern Nestor of the Law. Lord Halsbury, in responding to the toast of 'The Bar' at a legal function not long before the beginning of the war, remarked that 'he had been a member of the Bar, for sixty-three years,' and claimed to be one still. The same view was expressed even more emphatically by Lord Esher in his valedictory address to the Bar when he resigned the Mastership of the Rolls :

I am still one of you, I am a serjeant-at-law. I am a barrister of more than ten years' standing. I am capable of being appointed a County Court Judge or to sit as a Commissioner to hold an Assize. It is true that on the Bench, where I was in the position of an officer on the quarter-deck, I was obliged to give occasionally words of command; but the moment one leaves the deck one is nothing but a fellow officer, and I have been nothing but a fellow barrister with you always.

Many a barrister who has been appointed to a high judicial office in the Crown Colonies has on his retirement from the office, resumed his place at the Bar. The late Sir Arthur Collins, K. C. for instance, reappeared in the King's Bench Courts after occupying the position of Chief Justice of Madras for nearly fifteen years. Among the County Court judges who, abandoning their judicial duties, have returned to the Bar is to be numbered Sir David Brynmor Jones, K. C. whose death we recorded with regret in our Obituary column last week, resigning his County Court judgeship, after holding it for seven years, for the purpose of entering the House of Commons. He proved that he was still a member of the Bar by becoming subsequently Recorder of Cardiff and a Master in Lunacy. There is, however, no modern instance of a High Court Judge.

returning to the Bar, though Sir Henry Hawkins in his later years was credited with the intention of resuming his old place as an advocate, "in order to show these young fellows how it ought to be done."

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The Trials of the War Criminals. Whatever may be thought of the measure of punishment allotted to the German War criminals indicted by our Government and tried and convicted by their own Supreme Court, there can be no question that an important gain has been made for the Law of Nations by the assertion of the principle of criminal liability for acts done in violation of the accepted laws and conditions of war. Something has been gained, too, by the change of venue of the trial from the military tribunals of the Allied and Associated Powers proposed to be set up for the purpose by the Treaty of Peace (Article 228) which would have been open to question as only another form of assertion of the visitors' arbitrary power and the substitution for them of the Courts of the offenders' own country, which themselves were really on trial to give evidence of their sincere resolve to administer this exceptional form of justice in good faith. To the final list of forty-five names handed to the German authorities our Government contributed the names of seven persons who were charged with grave outrages against the laws of war, and four of these have been actually tried, all but one being convicted and sentenced to terms of imprisonment as ordinary criminals, be it observed and not by mere confinement in a military fortress. The official report of the proceedings before the Supreme Court in Leipzig, where the trials were held, has been issued as a Command Parliamentary Paper (Cmd. 1450) and indications are not wanting of a sincere desire on the part of the judges to quit themselves properly of the painful duty which was imposed on them to clear their country of the charges of sheer barbarism and organised brutality by the condemnation of those guilty of the outrages. 'The good reputation of the German army' said the President, 'and the respect of the German nation as a nation of culture was to be upheld.' The most striking evidence of the *bona fides* of the authorities and of the will of the tribunal to do justice was furnished by what happened in the case of, perhaps, the greatest of all the offenders, the Commander Patzig who was charged with the dastardly crime of not only torpedoing

a hospital ship, but of afterwards deliberately firing on and destroying two out of the three surviving boats for the purpose of getting rid of the evidences of his crime. Patzig had disappeared, so that he could not be brought to trial, but in the course of the preliminary enquiry into the charges by the German authorities, two of his officers, Lieutenants Dittman and Boldt, were examined and implicated themselves by refusing to give any information on the ground that they had pledged their word to their commander not to disclose what had happened in connection with the destruction of the hospital ship. They were brought to trial by the German authorities themselves on charges of murder, and the Court held that the plea of superior orders would not avail these officers in such a case. While relieving them of responsibility for the torpedoing of the ship, which was the commander's own act, the Court found that they had concurred in the firing on the boats, though without premeditation, and that they could have prevented this barbarous action by refusing to pledge themselves to secrecy, and declaring their intention of reporting the incident on their return to port. They were both condemned to long terms of imprisonment—four years in each case—in addition to their dismissal from the service. The Solicitor-General, Sir Ernest Pollock, is well justified, by the detailed report of the proceedings, in the assurance which he has given to Parliament that the trials were in no way illusory, and that the Court had a sincere desire to ascertain the truth. 'For the first time in the history of the world,' he said, 'the vanquished country had been made to try its own war criminals, and the Court had found some of their own nationals guilty of atrocities.' That undoubtedly marks the gain of a new milestone in the advance of international justice, and it is well, setting aside all ideas of vengeance, to acclaim it

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Lord Bacon. Bacon in his advice to Justice Hutton, says :
" You should be a light to open their eyes, but not a guide to lead them by their noses."

* * *

Lord Mansfield. The advice of Lord Mansfield to an old army officer, appointed Governor of a West India Island,—
"Decide promptly, but never give any reasons for your

decisions. Your decisions may be right, but your reasons are sure to be wrong,"—*Bench and Bar*.

Justice Bramwell, when attempting to be clear, was at times perplexing :

"My good woman," said the learned Judge, "you must give an answer in the fewest possible words of which you are capable, to the plain and simple question whether, when you were crossing the street with the baby on your arm, and the omnibus was coming down on the right side and the cab on the left and the brougham was trying to pass the omnibus, you saw the plaintiff between the brougham and the cab, or whether, and when you saw him at all, and whether or not near the brougham, cab and omnibus, or either, or any two, and which of them respectively, or how it was?"

Judge Cooley once said to his law class : Young gentlemen, beware of the fatal facility of speech.

Justice Norris is said to have delivered in the High Court of Calcutta the shortest charge ever delivered to a jury:

"Gentlemen of the jury, the prisoners have nothing to say, and I have nothing to say; what have you to say?"

"Guilty", was what the prisoners heard the jury say. *Ibid*.

CONTEMPORARY LEGAL LITERATURE.

The American Law Review for May and June has a contribution on the Law of Possession governing the Acquisition of animals *ferae naturae*. In primitive society the first appropriator was regarded as the owner of all things. Whether the article possessed was real or personal property, corporal and incorporeal, movable or immoveable was immaterial. This is but the instinct of unorganised society, for the sense of property inheres in the human breast. The right of the first taker to the ownership of wild animals is recognised as the law of to day. They being originally the property of no one, the possessor may acquire by what the Roman Law called *occupatio* a good title against the world. All inanimate things are capable of absolute ownership which denotes a complete title and possession. Wild animals after being killed belong to the person killing them, but there can be no absolute property in a living wild animal, with the possible exception of oysters planted in a clearly marked bed.

A qualified property right may exist in animals *ferae naturae* in three ways *per industriam*, *per impotentiam* and *propter privilegium*. To acquire a qualified property in animals *ferae naturae per industriam* it is essential to show that animal is brought within the power and control of the pursuer. Mere pursuit does not give any right. While physical taking is not necessary in every case, possession must be so far established by the aid of nets, traps and other devices that the animal in all probability will not escape. No right attaches until possession is acquired. Custom however may alter the rules mentioned governing the acquisition of a qualified property in animals *ferae naturae*. The Courts are quite clear that a trespasser can secure no property in wild animals captured on the land of another as against the claims of the owner of the land. This rule is contrary to the Civil Law which permitted a trespasser to acquire a right in such animals captured on the land of another. The Common Law distinctly recognised ownership in wild animals *ratione soli*. The English view is that the owner of the land has the right to animals *ferae naturae* found thereon as against the trespasser who killed them there. The second method of acquiring a qualified property right in wild animals is *per impotentiam*. It is said the owner of the land has such right in the young of animals *ferae naturae*, *ratione impotentiae* until they can run or fly away. The owner of the soil has the young in his power and they cannot acquire their natural liberty because of impotence. They being in the possession of the landowner become his qualified property. He has sufficient title to maintain a civil action, and no one can deprive him of his property. To do so, one would be a trespasser, and, as previously explained, he could acquire no rights against the owner of the land on which animals are found.

The third way to secure a qualified property is *propter privilegium*. It was a franchise anciently granted by the Crown by virtue of his prerogative. It exists where one has the privilege of hunting or taking animals to the exclusion of other persons, as in a park or on private grounds. The qualified property exists only so long as the game continues within the privileged place.

Thus it is to be observed that in case of wild animals, possession gives qualified ownership, which is as much under, the protection of the law so long as it lasts as any other pro-

erty. Ownership of them is acquired by taking possession and control, and property therein is contingent upon ability to reproduce at will the original physical relations to the animal. Unlike the case of the finder of lost property who is not required to continue to retain his original physical possession of the article found in order to preserve his special property right, the one who secures a qualified property right in a wild animal must continue the same control over it so long as it is wild, or he will lose any right therein to a subsequent captor. One who captures such an animal has the entire title to it, though it is defeasible, while the finder of lost goods has an indefeasible special title to his find as against every one but the true owner. A qualified property exists when goods are bailed or pledged ; but in those cases, the right to the property and the possession are separated. In the case of animals *ferae naturae* the possession and right of property are united in the same person.

The March number of the *Harvard Law Review* has a note on the Rights of Unborn Children in the Law of Torts, where the writer discusses the question whether a child may have a right of action in tort for prenatal injury. In spite of broad statements in decisions to the effect that to all intents and purposes the child *en ventre sa mere* is a living person and in spite of the favour with which eminent text writers regard the existence of this right no action brought by a child for prenatal injury has progressed beyond the demurrer stage. It has been said by Markby in his *Elements of Law* that there is a recognised duty to abstain from injuring the unborn child quite apart from the duty not to injure the mother and another writer thinks that every person has a right to bodily integrity at birth but neither writer will accord the infant his right of action. The Japanese Code seems to consider a child *en ventre sa mere* as already born with regard to claiming compensation for damage. In a recent New York case in which by reason of injury to the mother resulting from the defendant's negligence it was alleged that the infant was injured, a plea of demurrer by the defendant was overruled. The objections to the step taken by the New York Court resolve themselves into two principal difficulties. First, is the unborn infant a person ; and secondly can causation be established? First as to the infant's personality the question is whether the infant is part of the

mother or a distinct person ; in brief whether the mother or the infant should sue. Mr. Justice Beggs thinks that whenever a child has so far advanced in prenatal age that should natural or artificial parturition occur, the child can live separate from its mother, and is thereafter born and lives, such a child has a right of action for any injuries wantonly or negligently inflicted while in its mother's womb. Before such a time the child is clearly only a part of its mother, but thereafter it is something more. This doctrine properly limits the time during which injury to one *en ventre sa mère* is actionable. If science cannot trace the deformity in the born child to the injury to the mother before its birth it is idle for the law to speculate. This difficulty does not arise where there is negligent injury by direct application of force to the child's body before birth, as by the forceps. Under these conditions it seems unquestionable that the infant when born should have its right of action. But in the case under discussion the alleged injury to the child was indirect and negligent. Even so, it is undeniable that medical science is so far advanced that there are some such injuries which can be unerringly traced by experts into postnatal deformities. In another decade who can say that there may not be many ? "At least give the infant his place in Court. It is for (him) to make out his case. If he does so, there is no difficulty. If he does not, there is no liability." This is what Mr. Bevan said in his book on negligence.

BOOK REVIEW.

Notable British Trials Series. Trial of Thurtell and Hunt.
 Edited by E. R. WATSON AND PUBLISHED BY MESSRS. BUTTERWORTH & CO.

The publication of the series of Notable British Trials is full of interest to the Layman and the Lawyer. The famous trials in which most eminent Judges took part to unravel the mysteries of the crimes which created a great sensation in those times, the forensic talent displayed at the bar by its most distinguished members and the instances of powerful cross-examination to which the witnesses were subjected are at once a model of perfection in criminal trials and a guide to future Judges and lawyers in their arduous labours. To the layman this publication

is valuable for the truthful depiction of facts and the unfolding of deeply laid plots which have a living interest as against fiction which creates only sensation for the time. We therefore commend this Volume which is one of a series, for the high educative value and great interest of its contents for all time.

Hindu Law by J. R. GHARPURE, B.A., L.L.B., VAKIL, BOMBAY HIGH COURT, BOMBAY. THE COLLECTION OF HINDU LAW. TEXTS OFFICE, GIRGAON, 3RD EDITION, 1921: 1£ PRICE Rs. 10.

The third Edition of this book which has just been published while fully maintaining the distinctive feature that it is intended for the student preparing for law examinations is not without its use for the Practitioners. The subject has been dealt with in such a manner that the student who may not have a previous acquaintance can easily assimilate the leading principles of Hindu Law. The division of chapters into the various heads and the various types used give the student an indication of the importance or otherwise from this point of view of the points dealt with. It is necessary to draw attention to the great usefulness of the appendices which treat of the principles of interpretation according to the Mimamsa and of the Śapinda relationship. The cases have been brought down to the end of July 1921. We would heartily recommend this volume for the use of all law students.

The Civil Court Manual, Imperial Acts, Volume II, Part A annotated by MESSRS. P. RAMANATHA AIYAR AND P. RAGHAVA AIYAR. PUBLISHED BY THE MODERN PRINTING WORKS, MADRAS.

We are in receipt of Volume II Part A of the Civil Court Manual annotated which publishes the Imperial Acts from the Land Acquisition Act to the Revenue Recovery Act reserving the other enactments to another volume to be published hereafter. The delay in publication of this volume seems to be due to the difficulties of labour and of getting paper and other printing materials that followed the closing of the great war. To

avoid this volume becoming very bulky the remaining enactments will be published in the third volume contrary to the original expectation. The contents of the volume fully maintain the high level of usefulness of the first which was reviewed by us elsewhere. We have every hope that this publication will be found to be of great use by the bench and the bar alike by reason of the copious foot-notes giving references to the various decisions under the several enactments.

The Domestic of Kerala by THE LATE MR. K. R. SUBRAMANIA SASTRI, B.A., B.L. Rs. 6.

Mr. K. R. Subramania Sastri was an intelligent and careful observer of the trend of judicial opinion in the matter of the Marumakkathayam Law of the West Coast. The present volume presents an Epitome of the case law on the subject with such reflections, as are called for by the case—law and will undoubtedly be found useful to the profession. This is fairly the first book of the kind dealing with the law as administered by the British Courts as well that administered by the Travancore and Cochin Courts.

The Madras Law Journal.

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NOVEMBER.

[PART XVI.

MR. SESHAGIRI IYER'S HINDU LAW BILLS.

I. EXCLUSION FROM INHERITANCE BILL.

Notwithstanding any rule of Hindu Law or custom to the contrary, no person governed by the Hindu Law shall be excluded from inheritance or from a share in joint-family property by reason only of any disease, deformity, physical or mental defect.

It shall apply to all provinces of India, except Bengal.

Statement of Objects and Reasons.

Certain classes of persons have been excluded from inheritance presumably on the ground that their present condition is due to sins in the former birth and that they are therefore not entitled to share in the patrimony. Without questioning the soundness of this reason of the rule, I am of opinion that in the times that we live in, such grounds of exclusion should not be allowed to deprive a person of temporal rights. These persons stand in greater need of assistance than their more favoured brethren who can earn their living. Public opinion has expressed itself strongly against the disability which the present state of the Hindu Law imposes on them.

My reason for excluding Bengal from the operation of the Act is based on the opposition which the motion for codifying Hindu Law met from the Bengal Representatives in the Legislative Assembly. It may be that the Members who spoke on that occasion only expressed their individual views and did not expound the collective opinion of that province. In that case the clause relating to the exclusion of Bengal may be modified in the Select Committee. If on the other hand Bengal is as orthodox as it has been represented to be, by seeking to apply the provisions of the Bill to that province, the passing of the measure so far as the other provinces are concerned may be jeopardised. This is my reason for excluding Bengal.

II..HINDU LAW AMENDMENT BILL,

(1) Notwithstanding anything in the Hindu Law to the contrary, the estate of a Hindu, not held in coparcenary, shall in the absence of heirs down to brother's grandson, be inherited in the order by (1) the son's daughter, (2) the daughter's daughter, (3) sister's son, (4) sister, (5) step-sister, (6) step-sister's son, and (7) step-mother, and only on the failure of the above by the father's mother or other heirs coming after her under the Mitakshara law of inheritance, provided that the female heirs succeeding as above shall take only such estate as a female heir would take under the ordinary Hindu Law.

(2) Nothing herein contained shall affect any special family or local custom.

In the course of a general manifesto asking the public to support these measures, Mr. Seshagiri Iyer writes :—

"On the occasion of introducing the first of the two Bills, I thought I noticed in the pronouncement of the Law Member a somewhat restrained note of benediction. No doubt, he said that the attitude of Government was one of benevolent neutrality ; but those that read his speech on the motion for the codification of Hindu Law and compare it with his present utterance could not help noticing a slight change. On the first occasion while deprecating the suggestion that a roving commission to examine all the departments of Hindu Law should be appointed, the Honourable Member hinted at facilities being afforded to those who were prepared to grapple with some of the pressing problems. On the second occasion a warning was conveyed against attempts at piecemeal legislation. It may be that the two positions are reconcilable. It may also be that my "fine radicalism," to use his language, detects differences where none exist. Or it may be that the particular measure that had the good fortune or misfortune to come at the top of the agenda was not favoured by the department. Anyway we must realise that the Government may not be prepared to extend freely the right-hand of welcome to attempts like mine. Their final attitude, as was foreshadowed, would depend on the degree of support which the outside public is prepared to give to the measure. It is therefore to that public that I address myself in this communication.

Those whose voice counts can be roughly classed under three heads : (a) the orthodox party : (b) the rationalist, and (c)

the fence expert. I shall dispose of the last class at once. They are more unorthodox in their ways than the rationalist. They pay but scant heed to the injunctions of the Shastras as to eating, etc., yet they are more loud voiced than the truly orthodox people in speaking of the inviolability of the ancient Smriti writers. Their opposition comes neither from conviction nor from reason. Many factors operate with them. Personal, clannish and other considerations less honourable actuate their speeches and votes. I am not afraid of them. On the floor of the Assembly and outside, I can deal with them effectively enough. The other two classes of people attract more serious thought.

The orthodox party have this in their favour. Their practice and precept coincide. Their outward actions are a real index to their inmost convictions. Such men, however much one may differ from them, command respect; their position should, therefore, be examined with care. I do not know whether Mr. Ramachandra Aiyar who presided over the Varnashrama Conference in Tanjore represents fully the views of this party. Very likely he does. I have read that speech with attention. I confess I do not quite appreciate the arguments. One argument is that the deceased from beyond the waters would certainly desire that the Dayadi should come before his son's daughter and sister. This thought-reading about the dead is beyond me. I have a crude idea that the disembodied spirits, if they exist, are actuated by the same likes and dislikes which guided them in this earth: another argument seems to hint at the unorthodoxy of commentators like Vignaneswara who have introduced a qualified principle of consanguinity as the test of heirship: well, until some one more respected than the author of Mitakshara is recognised by the community, smaller men like me must be prepared to act on his theories. It may be that Mr. Ramachandra Aiyar thinks that the law as we find it should be allowed to drift on as best as it can and that it would be irreligious for the legislature to attempt to remove the defects. Now take Manu's stanza about exclusion from inheritance. The very first category of excluded heirs is that of outcastes: yet more than 50 years ago, the Government legislated to remove the disability therein created by enacting the Removal of Caste Disabilities Act. We have submitted to it. Should the legislature supposed to contain

the representatives of the people have less power in this behalf? If so, why? Again Judges have held that portions of that stanza are obsolete. We obey these decisions. Is a popular legislature less competent to promulgate the same view? Different meanings have been assigned by different commentators to the text: and the word "from birth" has been shifted from place to place by judicial interpretation. The term "incurable disease," an addition by Yagnavalkya to Manu's toll of exclusions has given Courts no end of trouble. Is the standard of *incurability* to be measured from the point of view of Yagnavalkya or from that of the advanced bacilli expert of to-day? Whether recrudescence at stated intervals is a sign of curability or not? Are orthodox Hindus content to leave the law in its present state? I would far rather have Manu, in its pristine purity than leave the law where we find it to-day. Move for the repeal of the Removal of Caste Disabilities Act if you can dare, and to abrogate judicial decisions passed by the Judicial Committee downwards; but do not be under the impression that you are serving religion or orthodoxy by leaving matters where they are.

Take again the Bill relating to the status of some of the female relations near and dear to us. Is it a serious argument to say that the laws are based on the theory of funeral oblations? The merest tyro in law knows that this is only a half truth. I would not waste ink upon proving this. The Mitakshara system of inheritance and succession is certainly not based solely on that principle. Here again I would draw the attention of the orthodox party to the conclusion reached by the Bombay High Court on the same materials. Would it be presumptuous on the part of the Legislature to try to bring the law into conformity with the views of these eminent Judges—views which reconcile natural love and affection with reason and law. I want the orthodox party to take note of the movement of the times. I am not against their endeavour to conserve all that is best in our traditions and civilisation; but I would warn them against attempts which tend to stop the current of the new life which is coming to us. Admiration, love and respect for the giants of old are not incompatible with respectful but firm demer to precepts and formulas which are unsuited to the conditions of life now around us. On one matter I join issue with them with all my strength. I am not

interfering with the religion of the land in introducing these measures. It is a meaningless and puerile charge that is levelled against me. You do not touch religion in the least by giving your son's daughter a nearer place than to a distant dayadi. Such a suggestion is preposterous. For all these reasons I appeal to the leaders of the orthodox party—more specially to the men of sanctified lives and of clean habits who are responsible for "*The Hindu Message*"—to deeply ponder over the problems and to give their considered views.

I now turn to those who are generally in agreement with my views. It is characteristic of Madras life in these days that the lawyer element has retired to the back benches on matters of national importance. Time was when the legal profession monopolised the platform and guided all political movements. In other parts of India, they are still to the fore. Not that I discount the appearance of leaders from other walks of life, but I do feel regret that those belonging to my own profession whose forbears did so much to awaken the national conscience are not in the brunt of the battle. There are notable exceptions—but the rank and file are apathetic. May I ask them to take the lead at least in effecting legislative reform on the lines indicated by me? Would it be too much to ask of the lawyer in the city and in the mofussil to give a few hours to a dispassionate consideration of the bills now before the Legislative Assembly? It is not much of a sacrifice that I ask them to make. Already one of their class, Mr. Palaniandy, has while paying a left-handed compliment to me personally predicted their adhesion to my views—but it is not silent approbation that I stand in need of. I want my brethren to actively work. I would ask every Bar Association to give me their full and reasoned views. I want such Associations to convene meetings of the people of the locality and to report to me and to the Government of India the resolutions passed at them. I would like to have a statement of the extent of the opposition to the measures manifested at such gatherings. May I count on such support from my brethren of the Bar all over India?

The womenkind of India have shown splendid perseverance and capacity in recent times. Their message has cheered me up a great deal. The measures I have in contemplation

would benefit them most. The one that I have introduced does not go far enough—but a beginning has to be made. When the ice is once broken the flow would be easy enough. I hope my sisters will not feel disappointed—I want them to back me up. I want them to rouse up their husbands, fathers and brothers. A heavy task lies in front of us. Any slackening of effort at this time would render further attempts in this direction impossible. My sisters must face the situation with a determination to carry the reform through successfully. Its inadequacy should not dishearten them. I take this opportunity to offer my respectful thanks to those European ladies who have worked with their Indian sisters in this matter.

Apart from the lawyer and the women-folk, there are a goodly number of thinkers and publicists who have shown keen sympathy with the work that I have begun. I am grateful to them for the encouragement they have given me. I want them to redouble their efforts.

In issuing this general appeal, I have not thought fit to offer explanations regarding the contents of the two bills. I am not wedded to details. I know that the grouping of the relations may be improved upon and that as regards persons who had been excluded, some one class or other may still be placed beyond the pale of succession. These matters deserve attention from the layman as well as the lawyer. I would be grateful to helpful suggestions on these questions. What I am most keen about is that the underlying principle of the bills should receive general support from my brothers and sisters."

We have no hesitation in according our full support to these bills. The policy of this Journal has all along been in favour of such legislation. In the very first year of its existence (1891) its Editors had occasion to express themselves very strongly in favour of The Gains of Learning Bill then introduced by the late Sir Bhashyam Iyengar. An article in the second Volume (1892) even advocated a complete codification of the Hindu Law but recognised that only 'fragmentary legislation' was for the time being necessary and desirable. In the very next Volume reference was made to the other Bill that Sir Bhashyam Iyengar had in contemplation, *viz.*, The Sister's and Sister's Son's Inheritance Bill and it was observed 'it is the bounden duty of Government to appoint a commission of well informed Hindu Lawyers to draw up rules on controverted

questions of Hindu Law which may be passed into law'. For the information of our readers and for facility of comparison, we append to this note a reprint of Sir Bhashyam Iyengar's Bill with his own exposition of its objects and reasons. We believe we can state without fear of contradiction that both Sir Bhashyam Iyengar and Sir T. Muthusami Iyer were well known for their orthodox conservatism and a measure which originated from the one and had the support of the other may safely be accepted as not likely to injure the cause of orthodoxy. It strikes us that the orthodox opposition to the present measures may in part at least be due to an apprehension that the passage of even such legislation may prove but the thin end of the wedge preparing the way for other proposals like the Civil Marriage Bill to which the orthodox section can never be expected to agree. It is for Mr. Seshagiri Iyer to see how best such apprehensions can be removed.

(SIR BHASHYAM IYENGAR'S BILL).

A BILL TO PROVIDE FOR THE SUCCESSION OF A SISTER AND CERTAIN OTHER RELATIONS UNDER THE HINDU LAW.

Whereas it is expedient to make better provision for the succession by inheritance of a Sister and certain other relations to the estate of a Hindu male; It is hereby enacted as follows:—

1. This Act may be cited as "The Hindu Sister's and Sister's Son's Inheritance Act, 189", and it shall apply to the property of a Hindu male dying intestate on or after the first day of January 189; provided the devolution by inheritance of such property is regulated by the ordinary Hindu Law of Inheritance as administered in the Presidency of Madras, including any customary or other rule of descent to a single heir.

2. In this Act unless there is something repugnant in the subject or context,—

(a) "Sister" shall mean a female born of the lawfully married parents of a male.

It shall include a daughter by a lawfully married wife of the adoptive father of a male. But it shall not include the

daughter of the parents of a male who has been given away in adoption.

(b) "Half-sister" shall mean a female born to the same father as a male but of different mothers lawfully married to the father, provided such male has not been given away in adoption.

(c) "Sister's son" and "Half-sister's son" shall include a son by adoption, provided such adoption was made with the consent of the sister or half-sister during her life-time.

(d) "Order of succession" denotes the order in which, according to the ordinary Hindu Law of Inheritance, as administered in the Presidency of Madras, including any customary or other rule of descent to a single heir, a relation of a deceased Hindu male succeeds to his estate or any portion thereof, in default of other relations having priority of right to succeed.

3. A sister, a sister's son, a half-sister and a half-sister's son shall be deemed to have positions in the "order of succession" in the order above mentioned next after a son of a brother of the half-blood.

4. Nothing in this Act contained shall.—

(a) vest in a sister, sister's son, half-sister, half-sister's son, any property of a deceased Hindu male which would otherwise have passed by survivorship to some other person.

(b) vest in a sister or half-sister an estate larger than, or different from that possessed according to the ordinary Hindu Law as administered in the Presidency of Madras by a female in property inherited by her from a male ;

(c) enable more than one of several sisters, sister's sons, half-sisters or half-sister's sons to succeed by inheritance to the estate of a Hindu male which by a customary or other rule of succession descends to a single heir ;

(d) enable a sister, a sister's son, a half-sister or a half-sister's son to succeed by inheritance when such person is affected by any disability which would disqualify such person from inheriting under the ordinary Hindu Law as administered in the Presidency of Madras and such disqualification has not been removed by any enactment for the time being in force ;

(e) affect any special custom or usage having the force of law.

STATEMENT OF OBJECTS AND REASONS.

The object of the Bill is partly to remove doubts which may exist as to the heritable capacity of a sister under the Hindu Law as ordinarily administered in this Presidency, and, principally, to assign, in the order of succession to a sister and to a sister's son, a substantial position which will remove the existing hardship and anomaly of an agnate, who may be removed as many as fourteen degrees from the propositus and who practically may be said to be a stranger, excluding a sister and a sister's son of the propositus. The hardship thus caused is peculiarly distressing in cases in which, for instance, a Hindu, the bulk of whose property may have been his self-acquisition, dies, leaving a widow, a daughter, and an infant male child born to him or adopted from among his daughter's children, which child dies, it may be, a few days after the father. The property then devolves by law on the widow as the mother of the deceased male child; and on her death, after having enjoyed the property, along with her daughter and daughter's sons, if any, it may be for many years, they as the sister and sister's sons of the deceased child are excluded in favour of the agnate Sapindas and Samanodakas, howsoever remote, of such child from whom, as the last male owner, descent will have to be traced. The power of testamentary disposition which may with advantage be exercised in cases where the law of inheritance works a hardship is unavailing in such cases by reason of the minority of the infant child. The Bill proposes to remedy the evil by assigning to the sister and sister's son, in the line of heirs, the places which they will have when regarded as father's descendants.

The sister and sister's son have had the severest struggle for existence in the order of succession, the latter having even "run the gauntlet of an adverse decision of the Privy Council."¹

Until the year 1875 the course of decisions and weight of authority in this Presidency were against the heritable capacity of a sister.²

In 1875, a Division Bench of the Madras High Court consisting of Sir W. Morgan C. J. and Innes J., held that a sister

1. XI M. I. A. p. 886.

2. Mad. Dec. of 1858 p. 175 : Mad. Dec. of 1859 Page. 247, and S. 493
Mayne's Hindu Law and Usage, (Fourth Edition.)

is entitled to succeed as a Bandhu or cognate kindred of her brother, and, as such, will be excluded by all agnates how remote soever. ¹

This decision was subjected to an adverse criticism by Mr. Mayne in his treatise on Hindu Law. ²

In 1881, a conflict arose between a sister and a sister's son, each claiming as heir to the deceased, and a division Bench of the Madras High Court consisting of Sir C. Turner C. J. and Kindersly J., very fully considered the former decision ³ of the Court and Mayne's criticism thereon. It was not necessary to decide in the case ⁴ whether a sister could be heir to her brother, since assuming that she could be, the Court was of opinion that the male claimant, the son of another sister, was a preferential heir. Had it been necessary to decide the point whether the sister could be an heir at all, the Court intimated that the respect due to Mr. Mayne's authority would have induced them to remit the point for decision to a Full Bench. They however, discuss the point and express an opinion that the former decision is right on the ground that the term "Bhinnagotra Sapinda" or "Bandhu" as used by the author of the Mithakshara means no more than a person connected by consanguinity but belonging to a different family either by birth or marriage, and that there is reason to believe that the author of the Mithakshara does not fully accept the doctrine that females could only inherit under an express text ⁵. Mr. Mayne in the Fourth Edition of his Hindu Law published since the date of the said decision comments on the same as follows :—

"Such a view is of course thoroughly intelligible and arguable and is probably the line that would be followed with most chance of success if the case came before the final court of appeal. It would be urged in reply with much force that every other Court which professes to administer the Mithakshara Law has come to a different conclusion, that the Madras decisions are opposed to usage and authority in that Presidency, and that in Bombay where a sister's right is undoubted, it is tested not upon any conclusions derivable from the Mithakshara

1. VIII Mad. H. C. R. Page 92.

2. Ss. 495 & 496 Mayne's Hindu Law (Fourth Edition.)

3. VIII Mad H C. R. p. 88.

5. I. L. R. V. Mad. Page 249.

4. I. L. R. V. Mad. p. 241.

but upon long custom and the express authority of the Mayukha." ¹

In a later Full Bench decision of the Madras High Court ² in which a step-mother's heritable capacity was considered, Mr. Justice Muthusawmy Iyer incidentally observed that he felt a difficulty in making up his mind against a step-mother's right of inheritance "because sisters have already been recognized to be entitled to succeed as Bandhus" ³; and it may be noted that in this case also the view is expressed that the author of the Mithakshara limits the Vedic rule of exclusion of women from inheritance only to property expressly granted to sacrificial purposes ⁴. In cases arising in other Provinces governed by the Law of Mithakshara the sister has been held not to be an heir except in Bombay. The title of a sister was raised for the first time on appeal to the Privy Council in a case from the North West Provinces in 1871; but the Judicial Committee refused to enter upon the question. ⁵ And in a later case from Madras in 1876 the same tribunal without any expression of opinion on the point, alluded to it as follows:—

"The impression would be erroneous because it is clear that the original Zemindar, having left a son, the whole inheritance vested in the latter, although he died afterwards an infant and unmarried, that the widow took as heiress to her son and that failing her, his sisters if they had a remote right to succeed as Bandhus (a question upon which their Lordships express no opinion whatever) could only so succeed after the Sapindas, of whom there are several, had been exhausted" ⁶. The Bengal High Court in a case governed by the Mithakshara, after a fresh discussion of the authorities, re-affirmed in 1882 the previous decisions that a sister is not in the order of succession. ⁷ The same decision was given in 1883 by the Allahabad High Court also in a case under the Mithakshara Law ⁸ on the ground that a sister was not expressly named as an heir. Under the Daya Bhaga Law of Bengal it has all along been clear, both on principle and authority that the sister is not an heir. In Bombay, however, the sister has all along been recognized as an heir both under the Mithakshara and the

1. Mayne's Hindu Law (Fourth Edition) S 497

2. I. L. R. VIII Mad. Page 107.

3. I. L. R. VIII Mad. Page 130.

4. XIV M. I. A. Page 176,

5. I. L. R. IX. Cal., p. 725.

6. VIII Mad. Pages 127 and 129.

7. I. L. R. I. Mad., p. 174 and 185.

8. I. L. R. V. All, p. 311.

Mayukha, the author of which (Mayukha) expressly assigns to her a position between the grand-mother and grand-father ¹. It will thus be seen that in Bombay the sister has all along been recognized as an heir occupying a high position, that in Bengal and the North West Provinces her claim as an heir has never been recognized, but that in Madras her claim has been recognized only a few years ago ² though in a more recent case ³ an opinion was expressed that, if it had been necessary to decide the point—which it was not—the question would have been referred to a Full Bench ; and her claim so far as it has been recognized is postponed not only to those of the agnates but apparently also to those of the male cognates.

The Bill does not aim at being a comprehensive measure by bringing in the cognate descendants of the ascendants beyond the father, corresponding to the sister and sister's son and by introducing certain other relations in the female line, but is limited to the sister and sister's son. The cases of hardship which actually arise are mostly in respect of the sister and sister's son. Further, the texts, which will be referred to, relate to the sister specially, whatever difficulties there may be in the interpretation and application thereof, and there is also the authority of two eminent commentators of the Mithakshara, *viz.*, Nanda Pandita and Balam Bhatta who interpret the term "brethren" in the text of the Mithakshara ⁴ which gives the inheritance to brethren, as including sisters, so that the brothers take first and then the sisters, though such interpretation has not generally prevailed ⁵.

The following texts which principally bear upon the sister's right of succession to a reunited brother may be cited :—

"If brothers (once) divided and living (again) together (as co-parceners) make a second partition, the division shall in that case be equal."

"If the eldest or the youngest brother is deprived of his share, or if either of them dies, his share is not lost (to his immediate heirs.)"

1. 1. Bom. H. C. R., (O. C. J.) Page 118 ; affirmed, IX M. I. A. Page 520 ; I. L. L. R., III Bom., Page 353 ; Ibid Page 369 ; I. L. R. IV Bom., Pages 188 & 198 ; & I. L. R. V Bom., Page 264.

2. VIII. Mad. H. C. R. Page 88. 3. I. L. R. V Mad., Page 249.

⁴ Chap, II Sect, 4 S 1.

5. T. L. L., 1883 (Jolly) Pp. 207 and 216.

"His uterine brothers having assembled, together shall equally divide and those brothers who are reunited (with him) and the uterine sisters" ¹.

These are quoted by Vignaneswara as having the force of law then still subsisting and are expounded by him in the Mithakshara ².

There is also a text of Vrihaspati to the same effect as the text of Manu.

"If brothers who have made a partition become through mutual affection reunited and again make a division of their joint property, the first born has no right to a larger portion."

"Should any one of them die or any how seclude himself from the world, his share shall not be lost, but devolve on his uterine brother, but she who is his sister is next entitled to take the share; this law concerns him who leaves no issue, nor wife, nor father, nor mother" ³.

Citing this text, the author of the Madhaviya declares that where there is neither wife, brother, nor mother "a sister takes the share of a reunited childless parcener" and that "in default of daughters and sisters all the Sapindas, &c. succeed" ⁴.

Sancha and Lichita declare:—"The daughter shall take the female property and she alone is heir to the wealth of her mother's son who leaves no male issue." ⁵

The interpretation of the word *brethren* by Nanda Pandita and Balambhatta as intending brothers and sisters in like manner as the word *parents* includes mother and father, and conformably with an express rule of grammar by Panini, is controverted by Kamalakara and by Nilakantha, the author of the Vyavahara Mayukha ⁶.

In 1867, the Judicial Committee, in a case from the North West Provinces, the decision in which mainly proceeded on certain admissions made by the Counsel for the Respondent, that a sister is no heir at all and that a sister's son cannot

1. Manu Ch., IX. Sl 210, 211 and 212, Sacred Books of the East Vol., XXVI Page 376

2. Chap., II Sec., 9 Ss. 12 & 13 (Stokes's Hindu Law Books Page 454.)

3. Colebrooke's Dig., Book V Ch., VIII. Sec., 1 S 407; and sacred Books of the East Vol. XXXIII Page 381.

4. Burnell's Translation Page 37 Sec. 47.

5. Colebrooke's Dig., Book V. Ch., Sec 3 Att. 1. S. 225.

6. Note 1 to S 1 Sec., 4 Ch., II Mithakshara (Stokes's Hindu Law Books p. 443); T. L. L. 1883 (Jolly) pp. 207 and 208.

succeed as a Bandhu, rejected the interpretation of the expression "brother's son" as including a sister's son, and the contention that, as being so included, he (the sister's son) would be entitled to succeed. The result of the decision was that a sister's son was held to be no heir at all under the Mithakshara Law ¹. The decision, as an authority that a sister's son is no heir under the Mithakshara, is no longer law, inasmuch as it has since been definitely settled that a sister's son is entitled to succeed as a Bandhu or Cognate ². In so far, however, as the decision overruled the contention of the Respondent's Counsel, that a sister's son was included in the phrase "brother's son," though at the same time he admitted, strangely and inconsistently enough, that a sister would not come in as an heir, as included in the word "brethren,"—and in fact the inclusion of sisters in the term "brethren" would not suit his client's case ³. It has been followed as an authority in this Presidency against allowing a sister and sister's son to succeed as being included in the terms "brethren" and "brother's sons." ⁴ But Mr. Justice Holloway, one of the three Judges who decided the case reported in VI Madras High Court Reports, page 278, in which for the first time it was held that a sister's son was in the order of succession in this Presidency, but in which case it was not necessary to decide his position as heir, observed as follows :—"It is satisfactory to find it at last recognized that the rule of law is not to be derived merely from the positive words of a commentator and still less from his omissions. It is a still more curious fact, that grammatically, there does not appear to be any such omission. Two of the most eminent commentators, one of them, one of the great Jurists of Southern India, have distinctly told us that, in accordance with an express rule of Panini the infallible, the word "brothers" means *brothers and sisters*. That the word in the dual has that meaning there can be no doubt: any dictionary shows it. There does not appear any reason why the plural should have a different signification, and these commentators evidently

1. XI M. I. A. p. 386.

2. XII M. I. A. p. 448. 2 Beng L. R. (F. B.) 28;

VI. Mad. H. C. R. p. 278 I. L. R. II Mad. p. 304; and I. L. R. V. Mad. 241.

3. XI M. I. A. p. 403.

4. VI Madras H. C. R. p. 278 per Scotland C. J. and Innes J.;

VIII Madras H. C. R. p. 88; I. L. R. II Madras p. 304; and I. L. R. V. Madras p. 241.

thought so" ¹. In the Bombay decisions the sister's right of succession is based not simply on her being specially mentioned in the Vyavahara Mayukha as an heir, next after the grandmother, but also on the interpretation of the word "brethren" as including sisters as well as brothers, in the text of Mithakshara providing for the succession of brethren. In I. B. H. C. R. O. C. J. p. 118. it was held on the authority of Nanda Pandita and Balam Bhatta that the word "brethren" in Ch. II., S. 4 para 1, of the Mithakshara, includes sisters as well as brothers, in like manner as the word "parents" in the order of succession as laid down in the Mithakshara includes father and mother; and this decision has been affirmed on appeal by the Privy Council ². In I. L. R., IV Bombay pp. 188 and 204 this interpretation of the word "*brethren*" is accepted by the High Court as the principal ground for admitting the sister to succeed. The above texts and authorities in favour of a sister's right of succession and her position next after a brother are cited not in view to suggest that the decisions in this Presidency recognizing the right of a sister and sister's son only as Bandhus or Cognates who are postponed to agnates including Samanodakas, are not justifiable but only as affording a reasonable basis and justification for introducing by legislation a change in the position of these two heirs, which change, it is believed, will be acceptable to the public, as being in accordance with natural feelings and instincts in matters of inheritance.

It might not be far wrong to state that if circumstances could admit of Hindu Law developing itself and being advanced by the growth of customary law, the sister and the sister's son like the daughter and the daughter's son would, ere this, have secured a high position in the order of succession. But owing to the existence of regularly constituted tribunals established by the British Government and the facilities which the people have of having recourse to Courts to vindicate their rights the moment they are infringed, there is hardly any scope at present for the growth of customary law which would correct and modify the old Hindu Law. It is therefore the duty of the legislature to advance and adapt the Hindu Law to the condi-

1. VI Madras H. C. R. pp. 285 and 286.

2. IX M. I. A. Page 520.

tions and sentiments of Modern Hindu Society without doing any violence to its general and leading principles ¹. Otherwise the Hindu Law will become crystallized without being advanced either by the growth of customary law or the aid of legislation. It will not be out of place to refer here to the forcible and significant observation of Justice Muthusamy Iyer in *Venku v. Mahalinga* ² decided in 1888. "Is not therefore the cessation of the usage indicated by the Privy Council the sound basis for judiciary action, especially when there is a standing Legislative Council and when only very imperfect material is available to a Judge who is bound to decide according to evidence for ascertaining whether to any and what extent there has been a substantial change in the sentiments of the large mass of the Hindu community in regard to a particular usage of a section of the Hindus? * * * * Is it not also a sound rule of legislative policy that judiciary legislation of the earlier period should gradually retire within the narrow limits of judicial interpretation in proportion to the increased activity of direct legislation through organized bodies?"

The rule of propinquity is the governing principle in succession under the Hindu Law as in other systems of jurisprudence ³; and the author of the *Mithakshara* was mainly influenced by considerations of consanguinity in determining the order of succession ⁴. But it is not easy to convince one that his daughter's son or his sister's son is not really such a close blood relation of his distant agnate Sapindas, or even, it may be, the Samanodakas removed fourteen degrees.

It is not intended and the bill will not purport to affect the law or usage as to the person who may have to perform the funeral obsequies and shraddhas of the deceased in cases in which the succession to his property is secured by the Bill to his sister or sister's son. Though as a general rule the person entitled to inherit is also the person who has to perform the funeral obsequies and shraddhas of deceased, there are

1. "Act VII. of 1866 "Bombay Hindu Heir's Relief Act" 1866 "

2. I L. R. XI Madras Pages 400 & 401.

3. T. L. L. 1880 (Sarvadhikari) p. p. 874 and 876.

4. I. L. R. V. Madras p. 247 ; T. L. L. 1883 (Jolly) p. 209 and Mayne's Hindu Law Sec. 471, 472 and 473.

yet some instances under the existing law and usage obtaining in this Presidency in which it is otherwise ¹. It may however be mentioned that the positions assigned to the sister and the sister's son for inheritance by the proposed Bill, correspond substantially with those they respectively have, according to the Dharma Sindhu (a work of wide celebrity in the Benares school whose authority in ceremonial matters is held in high respect) ² and according to the Nirnaya Sindhu (the great Mahratta authority whose opinion is highly respected also in the other schools) ³ in the series of relations who have to perform the funeral obsequies and Shradhas of a deceased person ⁴. The former work lays down that "on failure of the brother and the nephew, the father, the mother, the daughter-in-law and the sister claim the right in succession—on failure of sisters their sons are entitled to this right—on failure of the sister's son the father's brother, the uncle's son and the other Sapindas" ⁵. According to the latter authority also the order is the same. "On failure of the brother, the brother's son, father, mother, daughter-in-law, sister, sister's son, etc" are entitled "for they receive the inheritance" ⁶.

The sister's son who has now been definitely recognized as an heir under the Mithakshara by all the High Courts was always undoubtedly an heir under the Bengal Law, his position being fixed by the Daya Bhaga among the nearer agnates next after the grandnephew ⁷. The daughter and the daughter's son (who is only a cognate sapinda) are brought in both under the Mithakshara and the Dayabhaga next after male issue, the widow alone being interposed. But the sister's son who is also a cognate sapinda is expressly brought in by the Dayabhaga as the father's descendant next after his male descendants to the

1. Mayne's Hindu Law (Fourth Edition) S. 9, 459 and 468; and T. L. L.

1880 (Sarvadhikari) p. p. 871 872 and 874.

2. T. L. L. 1880 (Sarvadhikari), p. 106; & Mayne's Hindu Law S. 495 Note.

3. T. L. L. 1880 (Sarvadhikari) pp 123 and 124.

4. Goldstucker, page 31.

5. Dharma Sindhu. Book III CHAPTER II p. 4 and T. L. L. 1880 Sarvadhikari p. 111.

6. T. L. L. 1880 (Sarvadhikari) p. 124, II B. L. R. (F. B.) p. 35.

7. Daya Bhagya CHAPTER XI Sec. 6, and 8. Stokes Hindu Law Books p. 845.

third degree. But neither sister nor the sister's son is expressly brought in by the author of the *Mitakshara* in his compact series of heirs unless they are supposed to be included in the expressions "brethren" or "sons of brethren." The Bill will not assign to them as high a position as they will have if the expressions "brethren" and "sons of brethren" are to be interpreted as including them. But it will assign to them, in the series of heirs the positions which they will occupy as the heirs of the father in the descending line next after his male descendants. Narada declares—"On failure of a son, the daughter (succeeds) because she continues the lineage just like a (son); both a son and a daughter continue the lineage of father" ¹. In this respect the provision of the Bill, so far at any rate as the sister's son is concerned is analogous to the corresponding provision of the *Dayabhaga* with this difference, namely, that a sister's son will have a position one degree higher than that which he has according to the *Dayabhaga*, a difference which is due to the circumstance that, unlike the *Dayabhaga*, the author of the *Mithakshara* enumerates in his compact series of heirs only two and not three of the agnate descendants of the ascendants, *viz.*, their sons and grandsons ². A sister under the Bill will be placed before the grandmother, not after her as is the case under the *Mayuka*. As to the quality of the estate devolving upon the sister, the Bill will provide that it shall be only as estate for life of the same kind as the estate which under the *Mithakshara* Law a female heir has in property inherited by her from male. If the sister should be brought in next after the brother and before the brother's son, and the sister's son next after the brother's son, which will be their logical positions under the interpretation of the term "brethren" as including sisters, the result will be that on the death of the sister the inheritance (which will have to be traced from the last male owner) will pass to the brother's son, if any, to the permanent exclusion of her own son; whereas by postponing a sister to a brother's son, the inheritance, when once

1. Narada CHAPTER XXII S. 50 Sacred Books of the East Vol. XXXIII p. 201.
2. I. L. R. V Madras p. 291; and T. L. L. 1883 (Jolly) 208.

it vests in her will (as in the case of a daughter inheriting to her father) pass on her death to her own sons and her sister's sons, if any, as the next heirs of the last male owner. Further as between a sister and a brother's son, the preponderance of native opinion will probably be in favor of giving the preference to the latter. Manu has declared—"If among brothers, sprung from one father, one have a son, all have male offspring through that son"¹. Having regard to the circumstance that a sister unlike a brother will take only an estate for life and that on her death the descent will not be traced from her, half sisters and half sister's sons will not be dealt with by the Bill relatively to sisters and sister's sons of the full blood, in the same manner as brothers and nephews of the half blood are treated by the Mithakshara relatively to brothers and nephews of the full blood; but a sister of the half blood will be placed immediately after a sister's son of the full blood and a half sister's son will be placed next after a half-sister. Under this scheme when the estate once vests in a sister the descent on her death will be secured to her son, if any, in preference to the surviving half-sister if any. The relative positions which will thus be assigned to these heirs seem therefore to be the most suitable ones.

It need hardly be mentioned that the provisions of the Bill will be applicable only to the separate property of a Hindu male, the devolution of which is governed by the ordinary Hindu Law of inheritance, including the rule of descent of impartible estates to a single heir and not to the joint property of an undivided Hindu family. The high positions which will be secured by the Bill to the sister and the sister's son can be claimed only in cases in which the male owner from whom succession is to be traced dies after the coming into operation of the proposed Act and not in cases in which he, having died prior thereto, has been succeeded by a widow or other female heir who may die subsequent thereto. In the latter class of cases expectations of succession on the termination of the female's estate would have been formed with reference to the

1. Sacred Books of the East Vol. XXV p. 365; Manu Chap 9 § 182.

law in existence at the date when such female succeeded, and the conduct and affairs of the persons concerned may have been regulated with reference to such expectations. Strangers who have had dealings with such female in respect of the property inherited by her, may have secured the assent to such dealings of the then expectant reversionary heirs.

Sisters and sister's sons will take under the Bill, as a class, except in respect of impartible estates which descend to a single heir according to the rule of primogeniture or otherwise; and there will be no preferential claim as between sisters, founded upon the circumstance of a sister being a maiden, or unendowed though married; nor will a sister who is barren, or unlikely to have male issue, or who is a widow without male issue, be excluded from inheritance. Under the Mithakshara Law a maiden daughter is placed first, then an unendowed or indigent daughter, and last an endowed daughter; but barren or widowed and sonless daughters are not excluded as under the Dayabhaga of Jimuta Vahana and the Smriti Chandrika¹. It is very doubtful whether even the limited distinction among daughters, made by the author of the Mithakshara, is recognised by usage and custom in this Presidency. However that may be, the considerations on which such distinctions were probably founded do not seem to apply to sisters, as such, and in Bombay no preference as between sisters is recognised²; and it does seem unnecessary and undesirable to make such distinctions.

1. I. L. R. III Madras p. 265.

2. I. L. R. V. Bom. p. 264.

SUMMARY OF ENGLISH CASES.

Barnardo's Homes v Special Income-Tax Commissioners :
(1921) 2 A. C. 1.

Will—Residuary bequest—Charity—Exemption from income-tax.

The legatee of a share in a residue has no interest in any of the property of the testator until the residue has been ascertained. His right is to have the estate properly administered and applied for his benefit when the administration is complete. But until that time he has no property in any specific investment forming part of the estate or in the income from any such investment, and both corpus and income are the property of the executors and are applicable by them as a mixed fund for the purposes of administration. *Lord Sudeley v. Attorney General* (1897) A. C. 11 Relied on.

Where therefore there was a bequest of the residue in favour of a charity, the charity cannot claim exemption from income-tax on the interest on a sum representing the residue as from the date of the will but only from the date when the residue was ascertained. (1920) 1 K. B. 468 C. A. affirmed.

John Smith & Son v. Moore (1921) 2 A. C. 13.

Excess Profits duty—Computation of profits—Deductions allowable—Purchase of executory contracts—Capital expenditure.

The assessee acquired his father's business as a shipping and coal agent under the father's trust disposition and settlement on the terms of taking over the assets of the business at a valuation but without paying anything for goodwill. The assets included certain forward contracts made by the father with several colliery owners for the delivery of coal by the latter in several instalments. It turned out eventually that the contract price was far less than the market price of coal on the dates fixed for delivery and the assessee made a large profit. These coal contracts had been valued at £ 30,000 and this sum had been paid by the assessee on the acquiring the business. In computing the profits for purposes of excess profits duty in the year, the assessee claimed to deduct this £ 30,000 as representing part of the purchase price of the stock in trade.

Held by the majority of the House of Lords (*Viscount Fintlay* dissenting) that the deduction was not permissible.

Per Viscount Haldane and Lord Sumner :—The sum of £ 30,000 represented capital expenditure and could not therefore be deducted in estimating the profits of the trade for purposes of taxation.

Per Viscount Cave :—The Excess Profits Duty was a tax on a continuous business and the change of ownership of the business in the course of the year ought to be disregarded and the profits of the year were to be assessed to duty.

British v. Foreign Marine Insurance Co. v. Gaunt : (1921) 2 A. C. 41.

Marine Insurance—"All risks" policy—Damage to goods—"Casualty"—Meaning of—Burden of proof.

Where an insurer of goods consigned for carriage by sea sues in respect of a loss under an "all risks" policy he must prove that the loss was due to an accident or casualty. He is not further bound to prove the exact nature of the accident or casualty which occasioned the loss.

Per Lord Sumner "There are, of course, limits to "all risks". They are risks and risks insured against. Accordingly the expression does not cover inherent vice or mere wear and tear or British capture. It covers a risk, not a certainty, it is something, which happens to the subject matter from without not the natural behaviour of that subject matter, being what it is, in the circumstances under which it is carried. Nor is it a loss which the assured brings about by his own act, for then he has not merely exposed the goods to chance of injury, he has injured them himself. Finally the description "all risks" does not alter the general law; only risks are covered which it is lawful to cover, and the onus of proof remains where it would have been on a policy against ordinary sea perils." (1920) 1 K. B. 903 (C. A.) affirmed.

Great West Saddlery Co., Ltd. v. The King : (1921) 2 A. C. 91.

Constitutional law—Dominion of Canada—Central and provincial legislatures—Powers of—Provincial legislation restraining powers of company incorporated by Dominion—Ultra vires.

Where a company is incorporated by the Dominion under the Companies Act of Canada with power to trade in any

province, the Company may, consistently with Ss. 91 and 92 of the British North America Act, 1867, be subject to provincial laws of general application, *e. g.*, laws imposing taxes or relating to Mortmain or requiring licenses for certain purposes or as to the form of contracts. But it is not within the competence of the Provincial legislature to enact for the enforcement of such laws sanctions which if applied would sterilize or destroy the capacities and powers which the Dominion has validly conferred.

Condogianis v. Guardian Assurance Co. (1921) 2 A. C. 125.

Insurance—Warranty—Answers to questions by insurer—Answer literally true but untrue in substance—Effect of.

It is a first principle in the law of insurance, on all occasions, that where a representation is material it must be complied with—if immaterial, that immateriality may be inquired into and shown if but that ; there is a warranty it is part of the contract that the matter is such as it is represented to be. In the latter case the materiality or immateriality signifies nothing. An answer to a question framed by the insurer which is literally true but untrue in substance, avoids the contract of insurance. Where there is an ambiguity in the question framed by the insurer, the contract must stand if an answer has been made to the question on a fair and reasonable construction of that question.

The King v. Daily Mail. Ex parte Farnsworth (1921) 2 K. B. 733.

Contempt of court—Court-martial—Publication likely to prejudice fair trial and sentence—Inherent jurisdiction of High Court.

The publication of the sentence of a court-martial before it has been duly confirmed and promulgated with a number of comments adverse to the accused constitutes a contempt of that court.

Where a contempt of court is committed against a court-martial by a person not subject to military law, the High Court has inherent jurisdiction to take notice of the same and punish the person guilty of the contempt.

Wrightson v. Mc. Arthur and Hutchisons, Ltd. (1921) 2 K. B. 807.

Company—Charge—Goods stored in a room as security—Delivery of key—Licence to enter warehouse and remove the goods—Right of pledgee.

To secure the payment of price of goods sold by plaintiff to defendant, the latter set aside certain specified goods in two rooms in his premises which were locked up and delivered the key of those two rooms to plaintiff with an irrevocable license to enter the defendant's premises to remove the goods if necessary. *Held*, that possession of the goods passed to the plaintiff by the delivery of the keys of the rooms in which they were locked up. The delivery of the key had effect not as symbolic delivery but as giving the actual control.

Stone house v. Masson : (1921) 2 K. B. 818.

Criminal Law—Mens rea—Vagrancy—Professing to tell fortunes.

The rule that there must be *mens rea* to constitute an offence is not true of every offence created by statute. Whenever an Act is passed for the protection of the community against some evil influence, physical or intellectual, *mens rea* is not always necessary.

Under S. 4 of the Vagrancy Act, 1824, merely professing to tell fortunes is an offence in itself, whatever, the state of mind of the accused. It is not necessary to allege or prove that the accused did not believe in the possession of the powers claimed.

Frank Hill, In re : Holt & Co. Ex parte (1921) 2 K. B. 831.

Practice—Judgment recovered by firm in firm name—Retirement of partner—Right to issue bankruptcy notice in firm name—Rules of the Supreme Court O. 42, R. 23.

Where a firm has recovered judgment in the firm name, against a debtor, the subsequent retirement of one of the members from the firm, does not render it necessary that the firm should obtain leave of the court under O. 42, R. 23 of the Supreme Court Rules before presenting a bankruptcy petition in the firm name for adjudicating the debtor as a bankrupt.

Wigzell, In re: Ex parte Hart (1921) 2 K. B. 835.

Bankruptcy—Receiving order—Stay of advertisement and all proceedings thereunder—Subsequent dealings with bankrupt—Effect of—Bankruptcy Act, S. 45.

On a petition to adjudge a debtor a bankrupt a receiving order was made but the advertisement of the order as well as all proceedings under the order were stayed pending an appeal by the debtor against the receiving order. The appellate Court eventually dismissed the appeal of the debtor. At the date of the receiving order the bankrupt had an account at a bank. After the date of the receiving order and before the determination of the appeal therefrom, the bankrupt paid into bank sums which he had collected from his own debtors and drew out of his account sums exceeding the amounts paid in. It was found that the bank acted in good faith and received and paid the sums without knowledge of the receiving order against the bankrupt. On a motion by the trustee in bankruptcy claiming a declaration that the sums paid into the bank after the date of the receiving order vested in him as trustee. *Held*, (1) that the moneys paid into the bank after the date of the receiving order became the property of his trustee in bankruptcy by virtue of Ss. 18, 37 and 38 of the Bankruptcy Act, 1914; (2) that the bank were not entitled to credit themselves with the payments out of the bankrupt, as those transactions took place after the date of the receiving order and were not therefore protected by Ss. 45 and 46 of the Act; (3) that there was nothing "dishonest or contrary to natural justice" in the trustee enforcing the rights given to him by the Act; and (4) that the action of the court in staying the advertisement and proceeding under the receiving order could not prejudice the rights of the trustee.

Drake, In re: Drake v Green (1921) 2 Ch. 99.

Will—construction—Legacy—"In-door and out-door" servants—Interpretation.

Where a testator, who was the owner of a large estate comprising a mansion house, a house farm, woodlands and other lands, made a will giving legacies to all his "in-door and out-door" servants, *Held* that not merely domestic servants, but an estate cashier, a farm bailiff, a dairymaid, an engineer, a blacksmith, gardeners, casters, carpenters, gamekeepers, woodmen, bricklayers, farmhands and labourers in receipt of weekly

monthly or quarterly wages, were all included in the bequest. *In re Forrest* (1916) 2 Ch. 386 not followed.

Westwood v Heywood (1921) 2 Ch. 180.

Easement—Right to water supply—common owner of two tenements—Separate leases or conveyances of the two tenements—Rights of lessee or vendee—Merger—Acquisition of fee by tenant.

Where a common owner to two farms laid a pipe conveying water from one (the quasi-servient tenement) to another, (the quasi-dominant tenement) and subsequently leases out or sells the two tenements to different individuals, the right to take water passes by implication to the lessee or vendee of the quasi-dominant tenement.

Where a tenant from year to year acquires the fee, there is a merger of the tenancy.

In re Cuban Land and Development Co., Ltd. (1921) 2 Ch. 147

Mortgage—Redemption—clog—company—Debenture stock—Commission.

An agreement for the payment to debenture stockholders of an additional sum on a winding up of the company is, if fairly made, valid, as it is neither in the nature of a penalty clogging the equity of redemption nor inconsistent with or repugnant to the contractual and equitable rights of the company to redeem.

JOTTINGS AND CUTTINGS

Judges—Talkative and silent.—‘An over-talking Judge,’ said Bacon, ‘is no well-tuned cymbal.’ The truth of this observation has been emphasised by Judge Herbert-Smith in some interesting observations he made at his first sitting in the Norwich County Court, to which further allusion is made in our County Court Supplement this week. In the course of a reference His Honour announced that he intended to try a combination of the two. If this does not mean—as presumably it does not—that he intends sometimes to be garrulous and sometimes to be silent, the ‘mixture’ should be agreeable enough. Lord Alverstone, who himself contrived to strike the happy mean, more than once declared that ‘there is no greater nuisance than the talking judge.’ The undue interruption of counsel adds neither to the dignity nor the efficiency of the Courts in which the habit is practised. Lord Bryce, describing Sir George

Jessel's judicial methods in his 'Biographical Studies', remarks that 'the affair was from beginning to end far less of an argument and counter argument by counsel than an investigation conducted by the judge himself, in which the principal function of the counsel was to answer the judge's questions concisely and exactly, so that the latter might as soon as possible get to the bottom of the matter.' It is an excellent method if the judge is a Jessel, but not by any judge who is inclined to be talkative—which Jessel certainly was not—this Socratic method may easily result in a good deal of wasted time. 'It is no grace to a judge', adds Bacon, 'first to find that that which he might have heard in due time from the Bar, or to show quickness of conceit in cutting off evidence or counsel too short.' The interruption of counsel was once notoriously frequent in the Court of Appeal—so frequent, indeed, that a Law Lord with a touch of caustic wit was once induced to remark to the leading counsel for an appellant, 'Mr.—, I have been looking through the shorthand notes, and I observe that upon a few occasions you were allowed to interrupt the Lord Justices.' It is not, perhaps, without its significance that the arrears in the Court of Appeal have disappeared since the excessive interruption of counsel ceased to be practised there. For the main fault of an over-taking judge is that, by diverting the attention of counsel from the vital points in the case, he lengthens the proceedings and increases their cost. But if the garrulous judge is, to quote Lord Alverstone's terse description of him, a 'nuisance,' the silent judge is hardly to be described in more flattering terms. His chief defect is that counsel never know what is passing through his mind, and may waste time and energy in urging arguments which have already made their impression, or fail to deal adequately with points to which the judge is inclined to attach the most importance on the whole: Perhaps, talkativeness on the Bench is preferable to absolute silence. Counsel who are inclined to resent interruptions from the Bench may, at any rate, find some comfort in remembering what Lord Watson said to a member of the Bar who complained of his socratic methods: 'Eh, mon, 'replied the famous Law Lord, 'ye should no complain of that, for I never interrupt a fool.' : *The Law Journal*.

'*Harbouring a wife*.—It is a little startling in the year 1921 to read of an action for damages brought by a husband

against his father as a defendant for 'harbouring' his wife'. The Court of Appeal decided in *Reg v. Jackson* (1891) 1 Q. B. 671 that a husband cannot forcibly detain his wife in order to enforce his conjugal rights, thus overruling the dicta of ancient text writers. Bacon (Abr.) (Baron and Feme) lays it down without hesitation that 'the husband hath by law and dominion over his wife and may keep her by force within the bounds of duty and may beat her, but not in a violent or cruel manner. Sir Matthew Hale, C. J., was of opinion that 'moderate chastigation' as used in the writ of *supplicavit*, which was the wife's remedy in cases of actual or threatened violence, did not mean a moderate beating, but a moderate admonition. But although *Reg. v. Jackson* completely destroyed a husband's power to use force against his wife, the action which the Common Law gave to him against any one who induces a wife to leave her husband or to remain away from him still remains (*Phillipp v. Squire*, 1 Peake 114; *Smith v. Kaye*, 20 T. L. R. 261); and such an action was heard by Mr. Justice Avory during the week before the present Sittings formally began (*Stuart v. Stuart*, October 6). The defendant, although not denying that he gave the plaintiff's wife a home against the plaintiff's will, set up the defence which is, we believe, the only defence on which he could have succeeded, *viz.*, that he believed that the wife was justified in her desire to live apart from her husband, and, therefore, he offered her a home out of charity. More than a hundred years ago, when actions for harbouring were not uncommon, it was held that such a belief was a sufficient justification for the defendant in an action for harbouring a wife (*Barthton v. Cartwright*, 2 Esp. 480). Is any useful purpose served by allowing actions of this kind to be brought? Ought not the action for harbouring to follow into limbo the action of crim. con.? It seems absurd that anyone who offers an asylum to a woman who does not wish to live with her husband, and who cannot be compelled to do so, should be at the risk of an action for damages. The result might easily be that the wife would be driven on the streets.

English Barristers in Mandated Territories—Mr. Barrington Ward's excursion to the East for the defence in a murder case has excited much public attention on account of the bigness of the fee marked on his brief, but it has now another interest for

members of the English Bar. It has transpired, in late reports, that the learned King's Counsel was not allowed to conduct the defence at Bagdad, or to act in any other way than as an adviser or prompter to the local lawyers engaged in the case, owing, it is stated, to the 'laws of the Country.' We presume this means that the appearance of English counsel in a case before the Arab Courts is not yet tolerated in Mesopotamia by the regulations of the local Bar, and that the old conditions prevailing under the Turkish regime are still maintained though the country is one of the Mandated territories, and is to all intents and purposes under English control and governance. A different condition of things prevails in the adjoining former Turkish Province, Palestine, where the English mandate, designated by the Treaty of Versailles, and confirmed at San Remo, is already in active operation, though there are technical forms still required to complete it. There, under a British High Commissioner, with a member of the English Bar as Legal Secretary, a real Ministry of Justice has been established, and new Bar Regulations have been made, which not only permit, but encourage the introduction of English advocates. The leaders of this local Bar are, in Middle Temples, exercising their old functions in a new form; and they are reported to be enjoying a very lucrative practice, being specially favoured by the native populace, who are notoriously litigious: It is a mistake, therefore, to say, as has been averred by some organs of the daily press, that Mr. Barrington Ward's journey to Bagdad was the first occasion for an English Barrister to be instructed in an Arab case. The Arabs prefer to secure the services of Englishman whenever they can get them for the conduct of their cases before the Courts, and the acquittal of Mr. Ward's client after his introduction into it—though only in an advisory capacity—is not unlikely to increase the demand for the service of members of our Bar in the Mandated territories, which now offer a new and promising field for the exercise of their talents:

* * *

Abraham Lincoln :—A high sense of honor marked Lincoln's career at the bar. An incident will illustrate. A stranger called to retain his services. "State your case", said Lincoln. The man did. Then Lincoln said:

"I cannot represent you, for you are wrong and the other party is right."

"That is none of your business if I employ you."

"None of my business! My business is never to defend wrong. I never take a case that is manifestly wrong."

"Well, but you can make trouble for the other fellow."

"Yes", said Lincoln, "I can set a whole community at loggerheads; I can make trouble for this widow and her fatherless children, and thereby get you six hundred dollars which rightfully belongs as much to the woman as it does to you. But I won't do it."

"Not if I pay you well?" slyly suggested the would-be client.

"Not for all the money you are worth."

In his "notes for a Law Lecture", written in 1850, Lincoln drops some words of wisdom good for all time:

"Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a real loser--in fees, expenses and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man."

"Never stir up litigation. A worse man can scarcely be found than one who does this. Who can be more nearly a field than he who habitually overhauls the register of deeds in search of defects in titles, whereon to stir up strife and put money in his pocket? A moral tone ought to be infused into the profession to drive such men out of it."

* * *

James O'Reilly—James O'Reilly, an eminent Canadian lawyer, represented the plaintiff in the trial of a civil suit involving 200 \$ damages. In his address to the jury, he said:

Gentlemen of the jury, I am a plain, practical man, and do not wish to impose upon your time or insult your intelligence with useless verbiage or specious arguments. Let us look at this matter in the light of common sense. Suppose that one of your number has a horse to sell (here the jury roused themselves), and I wish to buy him. I offer you 100, you ask 150. We cannot agree; so we call in some honest neighbour like your worthy foreman and ask him to decide between us, and do the fair thing. He splits the difference, and makes it 125. Now apply your plain good sense to the present case on the same just principle. We claim 2,000. The defendant will not give

us anything. Do your duty as between man and man. I have all confidence in you.'

He sat down, and in a few minutes the jury returned a verdict for the plaintiff for 100 which was their idea of the happy medium between nothing and 200.

James Scarlett, the great English barrister, noted for his tact in examining witnesses, had a twinkling expression of sagacity in his look, and a humorous aspect which told amazingly with jurors. After a case had apparently been shattered the witnesses and argument of his adversary, Scarlett would rise and quietly begin.

"Gentlemen of the jury, I am quite sure that, like all the rest of us, you will have been overpowered and fascinated by the eloquence of the speech to which we have just listened with such delight. Let me now endeavour in my prosaic way to draw you down from the empyrean to which you have been lifted by my learned brother."

Then bit by bit the argument of the predecessor were ruthlessly stripped of verbiage, and their worthlessness exposed in its unadorned nakedness.

His success with juries was almost supernatural. The Duke of Wellington said of him: "When Scarlett is addressing a jury there are thirteen jurymen." As a writer observes: "What the Duke meant was, that Scarlett, suppressing the advocate, talked to them as one of themselves, and as having at heart the same object—the discovery of the truth. He did this so completely that the sense of his superiority was lost, and no suspicion broke upon them that they were under a spell woven by a master of his art."

After the breaking up of the court on the last day of a long Yorkshire Assize, Wightman, then at the bar, found himself walking in the crowd cheek-by-jowl with a countryman whom he had been serving day after day on the jury. Liking the look of the man, he got into conversation with him, and finding that this was his first attendance at the assizes, asked him what he thought of the leading counsel. "Well," was the reply, "that Lawyer Brougham be a wonderful man; he can talk, he can; but I don't think nowt of Lawer Scarlett." "Indeed," exclaimed Wightman, "you surprise me. Why, you have been giving him all the verdicts." "Oh, there's nothing

in that", said the juror ; "he be so lucky, you see, he be always on the right side."

* * *

Lord, Tenterden.—An involuntary witticism of Lord Tenterden—a great jurist, but by no means a humorist—shows strikingly the force of judicial habit. He was so thoroughly accustomed to keeping himself and everyone else to the precise matter in hand that once during a circuit dinner, having asked a County magistrate if he would take some venison, and receiving what he deemed to be an evasive reply : "Thank you, my lord, I am to take boiled chicken", he sharply retorted :

"That is no answer to my question. I ask you again if you will take venison, and will trouble you to say 'Yes' or 'No' without further prevarication."

Tenterden, though a man of fine imagination, and a poet, would tolerate no undue display of learning and sentiment at the bar :

"It is asserted in Aristotle's Rhetoric", argued a pedantic to his lordship.

"I don't want to hear what is asserted in Aristotle's Rhetoric," interposed his lordship.

"It is laid down in the Pandects of Justinian", continued the barrister.

"Where have you got now?"

"It is a principle of the civil law."

"Oh, sir, we have nothing to do with civil law in this court."

Lord Campbell insists that this pun of Tenterden, if it can be called one, was unintentional ; like that of Blackstone, who remarks in his Commentaries that "land marks on the seashore are often of signal service to navigators."

* * *

Westbury, Richard B.—In his later life, Chancellor Westbury, when sitting regularly on the Judicial Committee of the Privy Council, next Ex. Chief Justice Erle and asked him, why he did not attend.

"For three very good reasons", said Erle ; "because I am old, because I am deaf, and because I am stupid."

"These are no impediments", said Westbury ; " * is very old, * is very deaf, and * is very stupid, and yet we four make an excellent court."

Sir Charles Russell, referring to his method of professional work, says . "My rule is never to trouble about the authorities or case law supposed to bear on a particular question until I have accurately and definitely ascertained the precise facts. This rule I got from Lord Westbury. When young at the bar, and pleading before him, I was plunging into citation of cases, when he very good naturedly pulled me up, and said :

"Mr. Russell, don't trouble yourself with authorities until we have ascertained with precision the facts ; and then we shall probably find that a number of authorities which seem to bear some relation to the question have really nothing important to do with it."

No one could say a sharp or bitter thing with more complete coolness than Westbury. He remarked, with his misleading gentleness, when some one spoke of the Chief Justice of the Common Pleas, " I think that, with a little more experience, Bovill will probably make the worst judge in England."

BOOK REVIEWS.

Pollock and Mulla's Indian Contract Act Students' edition 1921: PRICE RS. 8 TRIPATHI AND CO., BOMBAY.

• We are in receipt of this abridged edition of the well-known treatise on the Indian Contract Act which has become too bulky to be used by law students preparing for their examinations. It is needless to dilate on the value of Pollock and Mulla's Commentaries on the Indian Contract Act because that work has been the foremost book on the subject since the publication of the first edition and it has gone through several editions. The students' edition has set out clearly the leading principles and decisions on the English Law of Contracts and on the Indian enactment so that the student is not taxed in getting up all the details which are unnecessary for the law examinations. We have no doubt that this book will be found very popular among the students for whom mainly it is intended.

Land Tenures in the Madras Presidency by MR. S. SUNDARARAJA IYENGAR, HIGH COURT VAKIL, MADRAS ; SECOND EDITION 1921. RS. 12-8.

Mr. Sundararaja Iyengar's book is by this time too well known to require any introduction from us. Having regard to the difficulty and importance of the subject and the excellent way

in which it has been treated in the work under review, we should have expected a demand for a second edition even earlier. However it is well as it is and Mr. Iyengar has now been able to incorporate in the book the result of several pronouncements recently made by the Privy Council, such as those relating to the effect of enfranchisement in the case of service Inams; the grant of rights to minerals in Inam lands *etc.* On the last mentioned topic the learned author observes (at p. 203) that 'where the original grant is not forthcoming the title deed issued by the Inam commissioner will lead to the inference that the original grant was one conveying minerals.' We venture to doubt if their Lordship's remarks can be made to go so far. All that they say is "their Lordship's attention has been drawn to many matters and in particular to the title deeds, the extract from the inam register, *etc.*, *etc.* and a land acquisition proceeding. Had these materials stood alone they might well have been urged as suggesting an inference that the original grant was in terms that supported the plaintiff's claim as to what passed under it? We may also note in passing that there seems to be a misprint at p. 121 l. 5 as to the date when the police services of poligars ceased. We believe it is 1816 and not 1876. We have dealt with the book at some length when reviewing the first edition. If in connection with the present edition considerable portions of the work have been rewritten, that has only served to enhance the quality and ability of the book which we cordially commend to students and professional men alike.

Commentaries on the Provincial Insolvency Act V of 1920 by MESSRS. P. RAMANATHA AIYAR AND P. RAGHAVA AIYAR PUBLISHED BY THE MODERN PRINTING WORKS.

We have great pleasure in announcing the publication of this work which is one of the most Comprehensive among the commentaries on the Act. The authors have in the preparation of the work made use of the standard authorities on the subject of bankruptcy in England and America. The notes under the various sections are full and accurate and references are given under each section to the analogous provisions of law in this country and in England as also to the older enactment which has been repealed by Act V of 1920. We have every hope that this publication will be of very great use to the Bench and the bar, especially in the mofussil where the standard works on the subject are not easily available.

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[PART XXII

THE LETTERS PATENT AND S. 98, C. P. C.

[*Sabitri Thakurani v. Savi*, I. L. R. 48, C. 48 (P. C.)
Bhaidas Shivdas v. Bai Gulab I. L. R. 45 B. 718 (P. C.)]

In the first of the cases noted above, it has been laid down by the Judicial Committee that except where it is otherwise provided by any other law or by rules framed under the Letters Patent or the Code of Civil Procedure, the Code is generally applicable to the High Court in the exercise of its Original Civil Jurisdiction and to appeals arising therefrom. Their Lordships rejected the view suggested in one or two Madras decisions that the provisions in the Code relating to appeals are intended to apply only to appeals from *subordinate* Courts. The second of the above noted cases decides that the Letters Patent come within the saving in S. 4 of the Code and that the provision in clause 36 of the Letters Patent is a "special form of procedure" within the meaning of that section. In the light of these two pronouncements it appears to us that it may be necessary to reconsider some of the Indian decisions relating to the scope of S. 98, C. P. C.

Stated generally the current view of the High Courts is that clause 36 of the Letters Patent applies whenever there is a difference of opinion between Judges hearing an appeal under clause 15 thereof or dealing with a matter not properly to be described as an appeal, reference or revision under some section in the Codes, but that in all other cases the matter must be decided in accordance with the provision in the Procedure Codes. This conclusion has however not always been reached by the same line of reasoning.

In cases arising out of the original Civil Jurisdiction of the High Courts, we believe no reported decision except the one to be noted below has held *after a consideration of the point* that the procedure prescribed by S. 98, C. P. C. (or the corres-

pending provision in the earlier codes) should be followed. As stated out in *Surajmal v. Horniman* ¹ the Bombay High Court did no doubt in two cases follow that procedure but the point was not raised or argued in those instances. *Gossami Gridharji v. Purshotam* ² was also a case from the original side and a Full Bench of the Calcutta High Court there held that S. 575, C. P. C., governed the case but the mainpoint for consideration by the Full Bench was whether in the case of a difference of opinion in a Division Bench, a further appeal lay under clause 15 of the Letters Patent. Among the three Indian decisions referred to by the Privy Council in *Baldas Shivdas v. Baigulab*, ³ it may be noted that in *Roop Laul v. Lakshmi Doss* ⁴ the conclusion in favour of the application of the Letters Patent is rested on the grounds suggested in *Sabapati v. Narayanasami Chetty* ⁵ of which one is no longer tenable, viz., that the provisions in the Code relating to appeals have in view appeals from a lower to a higher court and are therefore foreign to the scheme of the Letters Patent permitting appeals from one or more Judges of the High Court to other Judges of the same Court. It may also be observed in passing that this particular ground will exclude the application of the Code not merely in respect of appeals from the Original Side but also of all appeals under the Letters Patent, e. g., an appeal from a judgment of a single Judge or from the prevailing judgment of a Judge in any case from the mofussil. *Lachman Singh v. Ram Lahan* ⁶ which is also relied on in *Roop Laul v. Lakshmi Doss* ⁴ is one of such cases. In *Surajmal v. Horniman* ¹ the very Bench which a few weeks earlier had, by inadvertence, followed a different procedure, held that on a difference of opinion in a Bench hearing an appeal from the Original Side, the decision must be in accordance with clause 36 of the Letters Patent. The reasoning is much the same as that in the later judgment of the Privy Council but the learned Judges seem to lay special stress on the fact that the case had arisen on the Original Side of the High Court—though reliance is also placed on the decision in *Lachman Singh v. Ram Lahan* ⁶. In *Bhuter v. Lakhadu* ⁷ we find reference (along with other reasons) to the theory that S. 98,

1. (1917) 20 Bom. L. R. 185.

3. (1920) I. L. R. 45 B. 748.

5. (1901) I. L. R. 25 M. 555.

7. (1918) I. L. R. 43 B. 433.

2. (1884) I. L. R. 10 C. 814.

4. (1906) I. L. R. 29 M. 1

6. (1903) I. L. R. 26 A. 10.

C. P. C. must be taken to apply only to appeals to the High Court 'from courts of inferior Jurisdiction', but (as already pointed out) this conception does not seem to have met with the approval of the Judicial Committee as they have preferred to save the Letters Patent provisions by the express exception in Ss. 4 and 104, C. P. C., With regard to *Nundeeput Mahla v. Urquhart*¹ we must, with all respect, remark that it is difficult to follow how the Judicial Committee use it in the present instance. That decision was pronounced in 1870 when the Civil Procedure Code did not by its own force apply to the High Court and the incorporation thereof in the original Letters Patent of 1862 had been modified in the amended Letters Patent of 1865 (clause 37). The learned Judges in these circumstances held that even in an appeal from the mofussil a case of difference of opinion in the High Court would be governed by clause 36 of the Letters Patent and not by S. 23 of Act XXIII of 1861 (corresponding to S. 98 of the present Code)—See also the *Collector of Ahmedabad v. Samaldas*². It is only when Act X of 1877 applied the general Code of Civil Procedure to the High Court also that the question arose of a conflict or choice between S. 575 of that Code and clause 36 of the Letters Patent and a Full Bench of the Bombay High Court (dealing with a case from the mofussil) held in *Appaji v. Shivlat*³ 'that the provisions of the Letters Patent in this respect have been superseded by S. 575 of Act X of 1877, so far as regards cases to which S. 575 is applicable.' In *Gossami Giridharji's* case, the Calcutta High Court (as already stated) adopted this view even in connection with an appeal from the Original Side and when that litigation went before the Privy Council in *Gossami Giridharji v. Romanlalji*⁴ no notice seems to have been taken of this point.

Taking it as now settled by their Lordships' latest pronouncement that in appeals from the Original Side the procedure prescribed by clause 36 of the Letters Patent should be followed the question remains, does their reasoning stop at that limit or does it not also involve the conclusion that even in cases from the mofussil—in fact in any case heard by more than one Judge of a chartered High Court—the result must be in accordance with that clause. In other words, is it right to

1. (1870) 13 W. R. 209.

3. (1879) I. L. R. 3 B. 204.

2. (1872) 9 B. H. C. R. 205 at p. 212.

4. (1889) I. L. R. 17 C. 53.

say (as has been put in more than one Indian decision) that the Letters Patent should be invoked only in cases which are not covered by the Code *cf.*, *Manavikraman v. The Collector of the Nilgiris* ¹; *Krishen Dayal v. Irshad Ali* ². Seeing that the Letters Patent were meant to regulate the jurisdiction and procedure of the High Court as such and the language of clause 36 of the Letters Patent refers in general terms to its 'appellate jurisdiction,' the logical result of construing S. 4 of the Code as saving the Letters Patent seems to us to be that clause 36 will govern *all* cases coming within the plain and natural meaning of the words any 'function hereby directed to be performed by the High Court in the exercise of its original or appellate jurisdiction'. The story of the genesis of that clause (as related in the judgments of Scott, C. J. and Hayward, J.) in *Bhuter v. Lakadu* ³ only goes to confirm this view. In 1862 Sir Charles Wood pointed out that as in connection with *appeals*, provision was made for a difference of opinion by Act 23 of 1861 (which was made applicable to the High Court by clause 37 of the Letters Patent) it was necessary to provide by *rules* for the contingency that two Judges 'constituting a Division Court for the trial of cases in the exercise of original jurisdiction' may differ as to the judgment to be given. In the Letters Patent of 1865 however the Civil Procedure Code was no longer applied as such to the High Court (see clause 37 of the amended Letters Patent) and clause 36 was so worded as to cover both the original and the appellate jurisdiction of the High Court. It thus followed (as was held in *Nun-deput Mahta's case*) that in 1865 this clause applied to appeals from the mofussil as well. Assuming, as was held in *Appaji v. Shivalal* ⁴ that the Procedure Code of 1877 'superseded' this provision of the Letters Patent, this theory can no longer hold good in the view that S. 4 of the present Code saves the Letters Patent. Indeed Hayward, J. in one portion of his judgment in *Bhuter v. Lakadu* ³ would seem to recognise the inevitableness of this conclusion but he goes on to say that as the Civil Procedure Code has now been applied to the High Court and the appellate jurisdiction of the High Court over the civil courts in the mofussil has been derived from its provisions, the natural place to find the rules governing the exercise of this

1. (1918) 35 M. L. J. 110.

2. (1915) 22 C. L. J. 528.

3. (1918) 1: L. R. 43 Bom. 433.

4. (1879) J. L. R. 8 B, 204.

jurisdiction would be the Civil Procedure Code. The answer to this last argument however is that the application of the Code to the High Court (by S. 117) has in any view to be read as subject to the saving in S. 4 and as this is not restricted (as in S. 129) to the original jurisdiction of the High Court, the proper inference would seem to be that S. 98 applies only to those cases which do not come within the purview of clause 36 of the Letters Patent, on a plain and natural interpretation of its language.

In the Procedure Codes, of 1877 and 1882, the language of saving (in S. 4) was not as wide or general as in S. 4 of the present Code and the observation of the Judicial Committee in *Hurrish Chunder v. Kali Sundari*¹ that S. 588 of the Code of 1877 did not apply to cases 'where the appeal is from one of the Judges of the (High) Court to the full Court' has been understood as resting either on the principle of *Generalia specialibus non derogant* or on the peculiar character of appeals under the Letters Patent rather than on an express saving of the Letters Patent by the Code. While numerous cases in India have held (as above stated) that S. 575 of the old Code (or S. 98 of the new) governs appeals heard by the High Court from the mofussil, the question is discussed at some length only in *Bhuta v. Lakkadu*² but the judgment there seems to be dominated by the conception underlying most Indian decisions on the point that the Code alone is concerned with appeals to the High Court from Courts of *inferior* jurisdiction and the Letters Patent with appeals from one or more judges of the High Court to the full Court. In the case of Revision petitions the Civil Procedure Code makes no express provision (as in S. 439 of the Criminal Procedure Code) for a reference to a third Judge or otherwise and there is conflict between *Narayanaswami Reddi v. Osuru Reddi*³ and *In re Karri Venkanna*⁴ as to the result of a difference of opinion between the judges in such cases. In *Rajah of Venkatagiri v. Subbiah*⁴ this matter was adverted to, but the learned Judges avoided the question by concurring in a reference to the Full Bench under R. 2 (1) of the Appellate Side Rules.

1. (1882) I. L. R. 9 C. 432.

2. (1901) I. L. R. 26 M. 548.

3. (1915) 18 M. L. T. 591.

4. (1921) 41 M. L. J. 530.

SUMMARY OF ENGLISH CASES.

La Socié'te Les Affreteurs Reunis and The Shipping Controller, In re : (1921) 3 K. B. 1.

Practice—Discovery of documents—Crown—Privilege.

In a petition of right the Crown by virtue of its prerogative and in the public interests, is entitled to refuse discovery of documents to an adverse litigant and neither the court nor an arbitrator has power to compel the Crown to make an affidavit of documents when the privilege is claimed by the proper officers of the Crown.

Giles v. Kruger : (1921) 3 K. B. 23.

Receiver—Order appointing—Effect on third parties—Payment in ignorance of order.

Persons in possession of a fund, over which a receiver has been appointed in their absence, are under no obligation not to pay the fund to the person originally entitled. The order appointing a receiver is an order *inter partes*, it is in no sense an order creating rights or duties in rem, and consequently the person in possession of the fund or the debt, as the case may be, is in nowise limited as regards his rights or duties in reference to the debt by the appointment of the receiver.

Oxted Motor Co. In re (1921) 3 K. B. 32.

Company—Winding up—Extraordinary resolution—Notice—Waiver by shareholders—Right of third persons to object.

Where all the share holders of a company have been present at a meeting and passed a resolution to wind up the company, it is not open to any one else to impeach that resolution on the ground that the shareholders had not had notice of intention to propose the resolution as an extraordinary resolution and therefore the requirements of S. 69 of the Companies Act had not been complied with. The share-holders alone are entitled as of right to notice and if they waive the formality of notice, a resolution otherwise *intra vires* the members of the company cannot be impeached by others on the ground of want of notice.

Ware and De Feuille Ltd. v. Motor Trade Association (1921) 3 K. B. 40 C. A.

Tort—Cause of action—Combination—Trade protection—Publication of names of non-members in "stop list"—Damages—Injunction.

An act otherwise lawful though harmful, does not become actionable by being done maliciously in the sense of with a bad motive or with intent to injure another. A combination to do acts, the natural consequence of which was to injure another in his business is not actionable, if those acts are not otherwise unlawful, such as assaults, or threats of assaults, and are done in furtherance of the trade interests of those combining. Combinations which exceed this limit and cause damage by action intended to injure are actionable.

A combination among traders (1) intended to secure that new goods shall be sold at fixed price neither higher nor lower, by refusing to supply with goods a person who sells those goods at other than the fixed price; and (2) to inform the confederates who such persons are by means of a stop list; and (3) to take steps to insure that the person who is not to be supplied with goods directly is not supplied with them indirectly, is a reasonable and legitimate means of protecting trade interests. Consequently no injunction can be granted against the association of traders restraining them from publishing a "stop list" containing the names of persons who sell their goods above or below the list price and with whom the members should not deal.

Kutner, In re : (1921) 3 K. B. 93 C. A.

Bankruptcy—Discharge—Conditional order of suspension—Validity.

The direction given to the Court by the first proviso to S. 26 (2) of the Bankruptcy Act, in the event of proof being given of any of the facts set forth in sub-S. (3) of that section, to suspend the discharge until a dividend of not less than 10 sh. in the pound has been paid to the creditors, does not empower the Court to suspend that discharge until a larger dividend has been paid. To give such a power to the Court, and thus, in effect, compel the debtor to work for his creditors to an extent beyond

the prescribed sum as a condition of his discharge, is not to be implied from the statute.

Joachim son v. Swiss Bank Corporation (1921) 3 K. B. 110 C.A.

Banker and Customer—Relationship between Current account—Necessity for demand—Cause of action.

Money placed with a Bank on current account is, generally speaking in the position of money lent by the customer to the bank ; but all the incidents of an ordinary transaction of loan do not exist. For instance, the bank is not obliged to seek out the customer and pay him the amount. The debt is only payable at the bank during banking hours. There is also super-added the obligation to honour the customer's cheques to the amount of the moneys standing to his credit in his current account.

In this case the Court of Appeal held that in the absence of a special agreement, a demand by the customer is a necessary ingredient in the cause of action against his banker for money standing to the credit of the customer on current account with the banker.

Sheppard v. Glossop Corporation : (1921) 3 K. B. 132 C. A.

Local authority—Statutory power—Statutory duty—Distinction between—Negligence—Liability for damages.

Where a claim for damages is made against a local authority for negligence in the performance of its functions, a distinction must be drawn between the statutory powers and the statutory duties of the local authority. If a local authority having statutory powers decides to exercise those powers, it is under a duty to persons interested to take reasonable care not to cause damage, so far as the avoidance of damage is consistent with the exercise of the statutory powers. But it is under no legal duty to act reasonably in deciding whether it shall exercise its statutory powers or not, or in deciding to what extent, over what particular area, or for what particular time, it shall exercise its powers. In the case of an urban authority authorised by statute to light its districts, if it decides to light any area, its lamps and appliances must be placed and maintained with reasonable care so as to avoid danger to wayfarers or owners.

or occupiers of adjoining property. But there is no duty to exercise the power of lighting at all.

Nor, if the urban authority do light, is it obliged to light the whole of its district or any particular part of it. Again it is under no duty to light all dangerous places, or any dangerous place; and if it does light a dangerous place for part of the night, it is not bound to light it during the whole night.

Where therefore an urban authority ordered the lights in a street to be extinguished after 9 o'clock every night and the plaintiff walking in the street at 11 P. M. sustained injuries by trespassing into a private land and falling over a retaining wall into the adjacent street, *Held*, that the plaintiff could not succeed in an action for damages against the urban authority for negligence in the performance of its alleged duty to light the streets sufficiently.

Hall & Co v. Inland Revenue Commissioners : (1921) 3 K. B. 152 O. A.

Income Tax—Profits—Computation—Accounting period—Excess Profits—Duty.

Profits and gains, for purposes of income tax, must be ascertained on ordinary principles of commercial trading, by setting against the receipts of the year of account the expenses necessary to earn them. It would be wrong to carry into the accounts, as profits of one year, the estimated profits which would accrue in subsequent years and which might perhaps never be made at all. Where there is a contract for the sale of goods running over a period of two years, the only way in which the profits, arising from the working out of this Contract ought to be brought into account is to ascertain as and when they are realized on each instalment of delivery of the goods.

MasKell v. Hill : (1921) 3 K. B. 157.

Gaming Act, 1835 Ss. 1 and 2—Bets made by agent for principal—Cheques given by principal to reimburse agent—Claim to recover.

The Gaming Act, 1835 does not hit the case of cheques given by a principal to reimburse his agent for losses incurred by the agent through bets made by him on the principal's

behalf. The principal cannot recover the amount of the cheques from the agent in such a case.

Turner v. Kingsbury Collieries Ltd : (1921) 3 K. B. 169.

Declaration—Writ of prohibition—Subordinate Court—Judge sitting as arbitrator under special Statute—Remedy by appeal open to aggrieved party—Whether prohibition will lie—Discretion.

The writ of prohibition is a judicial writ, issuing from a court of superior jurisdiction and directed to an inferior court for the purpose of preventing it from usurping a jurisdiction with which it is not legally vested. The proceedings to be prohibited must be of a judicial character and not belonging to the Executive Government. If the jurisdiction of the Judge of the inferior court depends on contested facts, it is his duty to decide upon the facts and his decision cannot be questioned on prohibition. No prohibition will lie to an ordinary arbitrator, though it is a judge of an inferior court that is constituted as such arbitrator by statute. Whether there is a remedy by way of appeal for any error in the proceedings of the lower court, as a matter of general practice and convenience, a prohibition does not lie.

Neilson v. London and North Western Railway. (1921) 3 K. B. 213.

Railway—Carriage of goods—Owner's risk note—Deviation from route—Damage—Liability.

In a suit against a Railway Company by a consignor of goods for damages for delay in delivery, the railway company pleaded in defence the terms of the "owner's risk note" under which the consignor agreed, in consideration of certain reduced rates, to relieve the defendants "from all liability for loss, damage, misconveyance, misdelivery, delay or detention of or to such goods during any portion of the transit except upon proof that such loss etc. arose from the wilful misconduct of the company's servants."

Held, that as the railway company's servant was proved to have intentionally sent the goods to places which were in fact not upon the contract route, the delay did not occur "during

any portion of the transit" within the meaning of the consignment note, and that it made no difference in that respect that his intention in so sending them was the result of an honest mistake. The defendants were consequently not relieved from liability by the terms of the Contract.

The Tromp: (1921) P. 337.

*Bill of lading—Carriage of goods—Damage to cargo—
"Shipped in good order and condition"—Witness of bags—Liability of shipowner.*

Plaintiffs were the indorsees of a bill of lading for a cargo of potatoes shipped on board the defendant's vessel. In the bill of lading the potatoes were described as "shipped in good order and condition" with the qualifying words at the bottom, "weight, quality, condition and measure unknown." The potatoes were shipped in wet bags and the master of the ship who signed the bill of lading was aware of this fact. The potatoes arrived at the port of destination in a thoroughly rotten and damaged condition. In a suit by the plaintiff for damages against defendant *Held* (1) that though the defendant had guarded himself by the qualifying words from any representation as to the internal condition or quality of the potatoes, he had represented the external condition of the bags to be sound and was therefore estopped from setting up that the bags were wet when delivered on board; and (2) that as the main, if not the only cause, of the rotting of the potatoes, was the wetness of the bags, the defendant was liable in damages.

JOTTINGS AND CUTTINGS.

The Bar and the Magisterial Bench. Conflicts between the Bench and the Bar are, happily, so rare in England that they naturally excite a large amount of public interest, as well as a deep feeling of professional regret, when they do occur. Towards the close of the Bottomley-Bigland proceedings at Bow Street, in what, no doubt, was a moment of irritation in a rather strenuous inquiry, Sir Ernest Wild, K. C., addressed this observation to the presiding magistrate: 'Throughout the trial it is a matter of common comment, both in the profession and outside, that this has not been a fair or proper trial.' The particular ruling of Sir Chartres Biron's which occasioned this unwarranted attack upon him in his judicial capacity is not material. No more unbecoming words could be addressed by a member of the Bar to an occupant of the Bench, and Sir Ernest Wild, in the frank apology he made to the learned magistrate on Tuesday morning, did well to recognise that, while it is the function of every advocate to uphold the independence of the Bar, 'no counsel, whatever the circumstances, is entitled to accuse the Bench of unfairness.' The administration of justice would, indeed, become impossible if members of the Bar deemed themselves free to make such accusations, and especially if counsel of position felt themselves at liberty to level such charges at members of the magisterial Bench. The full apology of Sir Ernest Wild and its dignified acceptance by Sir Chartres Biron form what, at any rate, is an agreeable conclusion to a regrettable incident.

End of Vol. XLI.

NOTES OF INDIAN CASES.

GURUSWAMY *v.* CHINNA TAMBIAR ; I. L. R. 44 M. 1.

The main point decided in this case is that as between collaterals of the same degree preference is to be given to the senior line in determining the heir to an impartible estate which is the separate property of the last holder. This conclusion was reached on the authority of the Privy Council in *Bhai Narinder v. Achal Ram*¹. That was a case relating to one of the Oudh Estates governed by the Oudh Estates Act. It is not clear from the judgment whether the property was treated as the separate property of the deceased or as joint family property. If it was joint family property lineal primogeniture would have been the consequence but judging from what was said in that case at an earlier stage of the litigation, it was put the other way. The property was held to be one in which lineal primogeniture did not obtain. Even the rule as to primogeniture is not assumed. The judgment is so much tinged by the peculiar setting and by the admissions in the case that it cannot safely be taken as an authority under the general law. Apart from the authority of the case, it is difficult to see how seniority of line is a ground of preference.

The other point was as to the power of the holder of an impartible Zamindari to incorporate his separate acquisition with the zamindari so as to subject it to the peculiar rule of succession to which those estates are subject. It is no doubt correct to say that the case in 40 All. 470 was a case of Crown grant where no question of family custom arose. It is a note worthy circumstance that under the Oudh Estates Act, the recognition of such a power might lead to the Zamindari going to one set of persons, and the incorporated property to another having regard to the special rule of succession laid down which does not wholly coincide with the customary rule of succession recognised in the case of impartible estates. Again, the so-called family custom of impartibility etc. is not one that goes with the family with respect to all its property. It affects only the particular estate which is the family impartible estate. The power to incorporate with the estate must be one recognised by the family custom. We should think that the question is one to be decided on actual evidence as to custom and not on any *a priori* consideration. The law as to

¹ I. L. R. 20 Cal. 649.

partible estates is in a very unsatisfactory condition and the value of the observations in many an earlier case which proceed on the footing that they are family property are discounted by the fact that that position has been definitely discarded in later decisions.

On the other question that is discussed in the case *viz.* as to whether the family was divided in respect of the impartible estate, the observations made on the authority of *Tara Kumari v. Chaturbhuj Narayan Singh*¹ and *Rama Rao v. Raja of Pitta-pore*² lose a good deal of their force in the light of the latest decision of the Privy Council in *Baijnath v. Tej Bali*³ taken specially along with the decision of the same tribunal in *Raja Yerlagadda Mallikarjuna v. Raja Yerlagadda Durga Prasada Naidu*⁴.

JAYARAMA AIYAR *v.* VRIDHAGIRI AIYAR : I. L. R. 44 M. 35.

While fully recognising the force of the distinction between illegalities and irregularities in other contexts, and the difference between a sale affected by the vice of want of jurisdiction and that affected by mere irregularity, we must confess that we are not convinced that this is a case not coming within the scope of the words "material irregularity in the publishing or conducting sale" The irregularity complained of was non publication of the sale proclamation in the village where the lands are situate. This is held to be an objection not coming within O. 21, R. 90 and the case is approximated to *Bashratulla v. Umachurn Dutt*⁵ where a sale held at an earlier hour than that for which it was proclaimed made the sale an utter nullity, not a sale at all within the contemplation of the section. Frankly, *Bashratulla v. Umachurn Dutt* seems to be inconsistent with 5 All. 142 (P. C.), 21 Cal. 66 P. C. and 21 Cal. 70 (P. C.) not to speak of several decisions, earlier and later of the same Court. As pointed out by the Privy Council in the last case, the legislature does not seem to contemplate any distinction between *illegalities and irregularities* in connection with *the publication and conduct of sale*. Non-publication of sale proclamation and imperfect publication, holding a sale within 30 days, or after 30 days all stand on the same footing.

1. (1915) I. L. R. 42 Cal. 1179.

2. (1918) I. L. R. 41 M. 778. (P. C.)

3. (1921) 40 M. L. J. 887.

4. (1913) I. L. R. 24 M. 147.

5. (1889) I. L. R. 16 Cal. 794.

RAMA SAHU *v.* GOURO RATHO : I. L. R. 44 M. 55 F. B.

Having regard to the judgment of the Privy Council in *Varada Pillai v. Jeevarathnammal*¹ that an unregistered document is admissible to prove the nature of the possession, the decision in this case has hardly more than academic interest attaching to it. The difficulty arose out of the addition made to S. 4 of the Transfer of Property Act by Act 3 of 1885. S. 3 *viz.*, S. 107 shall be read as supplemental to the Indian Registration Act. It is difficult to see the object of this addition except to attract the provisions of S. 49 of the Registration Act unless it was to give a logical or scientific completeness. But as rightly pointed out by their Lordships in this case the section does not say that S. 107 shall be read into S. 17 in which case only the application of the provisions of S. 49 will be attracted to the transactions affected by S. 107.

VISVANATHAN CHETTY *v.* ARUNACHELLAM CHETTY : I. L. R. 44 M. 101 F. B.

The question in this case was : When a fund in court is attached by two decree holders one after the other in the same court whether the amount is to be rateably distributed between them or whether they should get in the order of their attachments. As there was no order appropriating any portion of the amount deposited towards either of the decrees or for the matter of that a transfer to the credit of either execution, their Lordships held that there was no receipt of assets within the meaning of S. 73 till after attachments and that rateable distribution was properly ordered by the Lower Court. The course of reasoning was this : O., 21 R. 52 applies to all cases where there is money in Court whether that court is the court executing or another court, though where the two courts are the same, the formality as to notice etc., may not altogether apply. Till the amount is transferred to the credit of the execution or some such order is made, acknowledging that the amount is subject to the orders in execution, there is no receipt of assets within the meaning of S. 73. But the amount when so transferred is amount got by the process of attachment under O. 21 R. 52 and is therefore assets. Assets in S. 73 is amount got by some

1. (1920) I. L. R. 43 Mad. 244 P. C.

process of execution directly or indirectly but would not include amount in court deposit without being assigned to any particular execution. In the case of attachment by the same court S. 73 would apply and there would be no scope for application of any equitable rule of equal distribution. So far the judgment seems to be all right. But there are certain further observations in the opinions delivered which require carefully to be considered. It is assumed that one court can attach proceeds in another court. It may be so when that other court is within the jurisdiction of the attaching court. If it is not within its jurisdiction, we do not see how the court can attach the fund. The only way it can be done is by getting the decree transferred to the court in which the fund is. The transfer of the decrees to the court will make the case *ad idem* with the Full Bench case. But now suppose the attachment is made by a court within whose jurisdiction the custody court also is and there is also an attachment by a decree holder in the custody court. How is the distribution to be made? The opinion of their Lordships seems to be that the first attaching creditor should have preference unless of course the decree holder in the custody court applies to have his decree transferred to the other court which the court could do under S. 39 (1) (d) so as to enable the decree holder to avail himself of the benefit of S. 73 C. P. C. There is nothing to prevent the court from adjourning the transfer of the amount to the credit of the execution so as to enable the decree-holder of its own court to make the proper application. If a rule be made requiring all decrees to be transferred to the court which holds the money apart from all question whether the court is within the jurisdiction or not, this is the course suggested by Sadasiva Aiyar, J, the unhealthy scramble that such a state of the law should encourage would be avoided. As it is, the decree holder in one court would not know to which court he should make the application for rateable distribution when there are decrees to be executed in different courts and attachments have been applied for in all those courts.

RAMANATHAN CHETTY *v.* ARUNACHELLAM CHETTY : I. L. R. 44 M. 43.

S. 57 of the Estates Land Act is some what curiously worded. "If the plff. establishes that the party sued is bound to *grant* or *accept* a patta, the collector shall inquire whether the patta demanded or tendered is a 'proper one'". Thus, so far as the section goes, the inquiry is limited to seeing whether the defendant is bound to grant or accept a patta and whether the patta is proper. The inquiry need not extend to seeing whether the plff. is *entitled* to demand the relief except in so far as it is involved in the inquiry as to defendant's liability. Now if you turn to S. 146, it will be found that where there is a transfer, on notice by the transferor and transferee or on production of a decree of court establishing the transfer, the landlord is bound to enter into engagement with him. The section does not say "subject to just exceptions." Could it be that it was intended that intricate questions of title should be gone into only in Civil Courts? But transfers are not the only cases in which difficult questions of title arise; there may be difficult questions of succession in respect of them. There is no such short cut provided in the Act. In those cases at least the court will have to embark upon the investigation of intricate questions of title. This aspect of the case it is that makes one hesitate to accept a limited construction of the section. It is an accepted principle that every court has jurisdiction to decide all questions necessary for the purpose of giving relief which is in its power to give whether it can decide those questions finally for all purposes or not.

MAHADEV *v.* SADASHIV I. L. R. 45 B. 45.

We may now take it that the preponderance of authority is in favour of the view that, except in cases covered by Ss. 26 and 28 of the Limitation Act, the law of limitation does not preclude a defendant from relying on a plea on the mere ground that, if as a plaintiff he sought to assert it, he would be barred by limitation. In the present case however, we are not sure that the revenue sale in question was rightly held to be invalid. It has no doubt been held that the existence of an arrear is of the very essence of a revenue officer's jurisdiction to bring the land to sale. But that principle has been applied to sales under executive authority whereas in this case the sale took place on foot of a decree of a revenue court and the properties were

purchased in auction by a stranger. It was only in a separate declaratory suit that the Court of Second Appeal held that no revenue was payable in respect of the holding and this decision was pronounced after the sale in execution of the revenue Court's decree. It seems to us that even, taking the declaratory decree to have the effect of reversing the prior revenue court decree, there is considerable force in the contention that a stranger purchaser in an execution sale should not be affected by the subsequent reversal of the decree on foot of which the sale took place. The learned judges get over it by drawing a distinction between sales in execution of civil court decrees and sales by revenue courts for arrears of assessment. What is described as assessment in the case was very much in the nature of cist payable to an inamdar and the logical result of the present decision would be that a sale in execution of a decree for rent obtained by a landholder in a revenue court (e.g., under S. 132 of the Madras Estates Land Act) will not be governed by the well-known principles governing judicial sales. Heaton, J. frankly supports the distinction on the ground that one cannot get 'the same qualities of impartiality and so forth in fiscal authorities as you are entitled to expect and ordinarily do obtain from the civil courts.' In this view, the whole policy of the rent law in all the Indian provinces stands condemned, in so far as it confers upon revenue courts exclusive jurisdiction on most questions arising between landholder and tenant, and makes their decision binding even upon Civil Courts.

SUBBASARI *v.* EMPEROR : I. L. R. 44 M. 47.

Sanction appeals are not appeals proper under the Criminal Procedure Code : that is accepted law. But are they appeals so as to exclude in the absence of express provision in that behalf power to take evidence? *Rama Aiyar v. Venkatachella Padayachi* ¹, *Krishna Reddy v. Emperor* ² would seem to involve both these positions. The practical inconveniences attaching to such a conclusion are obvious. But it is impossible to say that a court exercising appellate power has inherent jurisdiction to take *fresh evidence*. But it may be the Appellate Court while revoking the sanction on the ground that without fresh evidence, the matter cannot be finally disposed of, may ask the party to make an independent application to it.

1. (1907) I. L. R. 30 Mad. 311.

2. (1910) I. L. R. 33 Mad. 90.

DALUCHAND v. APPI : I. L. R. 45 B. 55.

The decision in this case seems to us open to question. It is difficult to understand how the directions in Ss. 12 and 13 of the Dekhan Agriculturists' Relief Act can control the construction of O. 2, R. 2. In *Dhondu Ramchandra v. Bhikaji*,¹ which the present judgment purports to follow, the Court held that when there are two mortgages of *different* dates between the same persons and upon the same property they constitute different causes of action. (See also *Subramaniya Iyer v. Bala Subramaniya Iyer*.)² Even where, as in this case, the mortgages happen to be of the same date, the principle of the above cases must, we think, lead to the same conclusion. (See *Seshaiyar v. Krishna Aiyangar*;) ³ for the question under that rule is not whether the *transaction* is one and the same but whether the cause of action or the obligation is one and the same. In so far as Dhondu Ramachandra's case rests on the rule of res-judicata it, seems to us to proceed on a misapprehension of the decision in *Sri Gopal v. Prithi Singh* ⁴. For, as explained by the Judicial Committee in *Radhakishen v. Kurshed Husain* ⁵ a prior mortgage right need not be asserted in a suit on the second mortgage unless the pleadings therein impugn the mortgagee's rights under the prior mortgage.

In so far as it is suggested that a person suing on a second mortgage while keeping back a prior mortgage in his favour may be enabled to commit fraud, it is sufficient to observe that that argument can be availed of only by an innocent auction purchaser and at any rate it has little force in cases where the pleadings expressly refer to the first mortgage as kept alive. As for the provisions of the Agriculturists' Act directing accounts to be taken of prior transactions as well between the parties, it was not the mortgagee's fault if, in the prior suit, neither the defendant nor the court had the accounts so taken in spite of the reference to the first mortgage in the plaint; and we cannot appreciate why the mortgagee should be punished for it merely because there is a possibility of fraud in some cases.

PANDURANG v. JAGYA : I. L. R. 45 B. 91.

This decision is in accord with the preponderance of authority both in Madras and in Calcutta. While it may be

1. (1914) I. L. R. 39 B. 135.

2. (1915) I. L. R. 38 M. 927 (F. B.)

3. (1900) I. L. R. 24 M. 96.

4. (1902) I. L. R. 24 A. 429.

5. (1919) I. L. R. 47 C. 66.

admitted that on the language of O. 21 R. 2, C. P. C., and of art. 174 of the Limitation Act there is nothing to preclude a decreeholder from proving and relying upon a payment out of court, made long before, in order to secure the benefit of S. 20 (c) of the Limitation Act for a later execution application of his, this seems to us a case of omission, for there can be no difference between the decree holder and the judgment debtor in the application of the policy underlying the last clause of O. 21, R. 2 whenever it is to their respective interest to plead an unreported payment. An admission of a part payment, though *prima facie* against the decreeholder's interest, may, in certain circumstances, be really to his benefit in so far as it helps to save limitation for the balance, and this removes the guarantee that the admission is likely to be true.

GENU *v.* NARAYAN—I. L. R. 45. B. 117.

The mortgage in this case was one of 1867 and we doubt if it was right to apply the provisions of the Transfer of Property Act to it. As for the Transfer of Property Act itself, it is true that it does not expressly refer to clogs on the equity of redemption; but all Indian decisions have proceeded on the footing that the absence of a saving in S. 60 in respect of contracts to the contrary indicates the intention of the Legislature to reproduce in India the English Rule against fettering the equity of redemption. The construction adopted in this case is no doubt *prima facie* correct, that the words "after the principal money has become payable" in S. 60 mean "become payable according to the terms of the mortgage contract"; But if, on the terms of the document, a right of redemption does accrue on a particular date, the rule against clogging it will, as we understand it, exclude any penal provision restraining its further exercise in default of redemption on that particular date. It may be a question whether or not this rule should govern anomalous mortgages (See *Hakeem Patta Muhamad v. Shaik Davood*¹ and *Kandula Venkiah v. Donga Pallayya*).² But we believe that, in cases not governed by the Transfer of Property Act, courts in India have more freely applied the English rule against clogging the equity of redemption. It is perhaps possible to contend that the mortgage was an anomalous mortgage but that is not the basis of the decision.

¹. (1915) 1. L. R. 39 M. 1010.

². (1920) 1. L. R. 43 M 589 F. B.

THAYYIL MAHOMED v. PURAYIL MAMMAD : I. L. R. 44 M. 140.

It is now well settled that all the members of a Malabar Tarwad are co-owners and all the talk about junior members having rights out of property and not in property are wornout fallacies. We are afraid this judgment trots out the old fallacy in a new garb. If the managing member of a Hindu Mitakshara family in Allahabad sold a property of the family for no necessity or made a gift of it though the transaction may in a sense be voidable, it could not be said that the right to set it aside would not descend. The position of the Karnavan is in no way higher than that of the manager of an ordinary Hindu family. His powers of alienation are if at all more limited. He has no right to insist upon partition. Except for the powers of the administration that he possesses, his position is no way better than that of the junior members. He has no higher rights of enjoyment than those of the other members. He cannot insist upon a larger amount of maintenance except in so far as the dignity of the family or the requirements of the maintenance of the family prestige require. He cannot himself ratify an unauthorised alienation by his predecessor or by himself on the ground that subsequent events justify it. *Kandasami Asari v. Markanda*¹ goes so far as to hold that unauthorised alienations by the manager are incapable of ratification. This may be going far but the view taken in this case that even when there is no ratification by other members before their death, their heirs (because the word attaladakam has no special significance) have no right of recovering the property. The right to set aside on the ground of fraud or undue influence descends to heirs. The right of the reversioner to set aside an alienation descends to his heirs. It is not easy to understand how the position of the junior members is inferior. If the right to set aside the alienation is that of the family, on the extinction of the family the attaladakam heir steps into all the rights and obligations of the family.

¹ (1910) I. L. R. 35 M. 177.

BHAICHAND KIRPARAM *v.* RANCHODDAS : I. L. R. 45 B. 174.

On the question whether the execution sale in the present case contravened the provisions of O. 34, R. 14 C. P. C. we would only refer back to our comments on the recent decision in *Ibrahim v. Nihalchand* ¹ which the learned Judges follow. Taking it that the sale was opposed to the rule, it is now well settled that the sale is on that account only voidable and not void. Apart from any rule of limitation, it was held so long ago as in *Ashutosh Sikdar v. Behari Lal* ² that *prima facie* the proper stage for an application to set it aside was before confirmation. And the same view is now confirmed by reason of the general language of Art. 166 of the Limitation Act of 1908, which it is no longer possible to restrict to applications under Rr. 89 to 91 of O. 21, C. P. C. *cf* *Muthia Chetti v. Baya Saheb* ³. In *Seshagiri Rao v. Sriuvasa Rao* ⁴ it was ruled that Art. 166 should not be applied to a sale made without jurisdiction or void ab initio. It may be a question whether in such a case an application to set aside the sale is necessary and whether it will be governed by any rule of limitation at all (short of a loss of title by prescription) but this point did not arise in the present case as the sale was held not void.

VENKATASUBBA RAO *v.* SATYANARAYANAMURTHI : I. L. R. 44 M. 179.

This case deals with the rights of the divided members of the family of the holder of a Karnam service Inam when the inam is enfranchised by the Government. In view of the decision of the Privy Council that the other members of the family whether divided or undivided have no right to the land, *Musti v. Musti* ⁵ the question cannot arise hereafter.

CHAMIYAPPA TARAGAN *v.* RAMA AIYAR : I. L. R. 44 M. 232.

*Many points arose in this case but the main point was whether an attaching creditor has got a right to redeem a

1. (1919) 1 L. R. 44 B. 366.

2. (1907) I. L. R. 35 C. 61.

3. (1914) 27 M. L. J. 605.

4. (1919) 38 M. L. J. 62.

5. 41 M. L. J. 1.

mortgage after a sale in execution of a decree on the mortgage if he has not been made party to the suit (ii) whether this right of his is transmitted to the purchaser in execution of the decree. Their lordships held on these questions (i) that the attaching creditor has not the right claimed (ii) that even if he had, the auction purchaser would not have that right. We think on the first question their lordships are right and that would have put the purchaser out of court. S. 91, cl. (a) and (b) of the Transfer of Property Act provide for cases, of persons having an interest in or charge on the property or the right to redeem the property and this category seems to exhaust the persons having an interest either in the mortgage security or in the right of redemption within the meaning of O.34, R. 1. The words 'right to redeem' in this rule as well as in S. 91, cl. (a) and (b) convey the same idea as the *equity of redemption* as it is understood by the English lawyers. Those clauses could not be held to refer to the right to sue for redemption declared by the section. In that view persons coming within cl. (c) and (d) would not be persons whom the mortgagee would be bound to make parties. As S. 64 of the Civil Procedure Code affects only *i.e.*, private transfers and not Court sales, the sale in execution of the mortgage decree would prevail. If the sale should take place in execution of the money decree pending the mortgage suit the purchaser would be affected by *lis pendens*.

If the judgment creditor was a person entitled to be made a party, we think the effect of such a provision would be that his right to sell would not be affected by the decree in the mortgage suit and the auction purchaser should on principle be a person not affected by *lis pendens*. He has the right to redeem under cl. (a) or (b) and if his right is not affected by *lis pendens*, he would have his right to redeem whether you consider him an assignee of the right of redemption possessed by the judgment creditor or not.

Certain other points were considered by the judges in this case. One of them was as to whether the attaching creditor if he had the right to redeem was bound to set aside the sale. On this point we prefer the opinion of Mr. Justice Sheshagiri Aiyar. The Privy Council case relied upon by the learned

Chief Justice had to do with a sale where the decree was conceded to be binding on the son. That position conceded he could not succeed unless he should proceed to set aside the sale. The case presents no sort of resemblance to the present case if the judgment creditor or the auction purchaser had the right to be made a party.

Another question that arose was as to the right of a person who had an agreement to sell in his favour before the date of attachment taking a sale. As a court sale conveys only *the right title and interest* of the judgment debtor whether the purchaser had notice or not of the agreement, the auction purchaser would take the property only subject to the equity. S. 27 cl. (c) of the Specific Relief Act saves only *transfers for value i.e.* to say private transfers and not execution sales. See *Bapinadu v. Venkayya* ¹.

1. (1910) 21 M. L. J. 82.

TILAKDHARI LAL v. KHEDAN LAL : I. L. R. 48 C. I. P. C.

On the main question in the case, their Lordships' pronouncement makes the question of notice one of fact and to that extent overrules the legal presumption drawn in certain Indian decisions from the mere circumstance of registration. The objective standard of the enquiry likely to be made by a prudent man is necessarily vague and the judgment cannot in the nature of things help to make it more specific. The observations with reference to S. 85 of the Transfer of Property Act in the attempt to distinguish *Mahomed Ibrahim Hossein Khan v. Ambika Pershad Singh*¹ and *Hel Ram v. Shadi Lal*² will, it seems to us, equally hold good in respect of O. 34, R. 1 of the Code of 1908 where even the words, 'provided that the plaintiff has notice of such interest,' found in S. 85 of the Transfer of Property Act have been omitted.

A subsidiary point in the case turned on what is described by their Lordships as the principle of feeding a grant by estoppel. As this question had not been dealt with in the courts below their Lordships had to remit the case for its further consideration. But they do so with a reservation based on the possibility that the law in India on the question may be different from that in England. The corresponding provision in the Indian Statute Law is contained in S. 43, T. P. A. and this has been construed in more than one Indian case as so far identical with the strict doctrine of estoppel that it could be availed of only by a person who has actually been misled by the representations of the transferor as to his title (See *Pandiri Bangaram v. Karumoor Subbaraju*³ *Hattikudur Narain Rao v. Andar Sayad Abbas Sahib*⁴). But under the English Law the principle is really part of the law of contracts and conveyances and it is noteworthy that in the statement of the rule by their Lordships at p. 20, no reference is made to any representation by the transferor and much less to the fact of the transferee being misled thereby. We must however await a more definite pronouncement by their Lordships as to the exact scope of the rule in India.

1. (1912) I. L. R. 39 C 527.

2. (1918) I. L. R. 40 A, 407.

3. (1910) I. L. R. 34 M. 159.

4. (1914) 28 M. L. J. 44.

JAGANNATH KHAN v. BAJRANG DAS AGARWALA : I. L. R. 48 C. 61.

The strict view adopted by the Judicial Committee in Shamu Pattar's case as to the meaning of attestation has led to a great deal of uncertainty and hardship in Indian litigation and this has only been aggravated by conflicting pronouncements in India as to whether or not the scribe can in any circumstances be regarded as an attesting witness. Some of the recent decisions are referred to in the case under notice and to them we may add the Bombay cases reported in *Dalichand Shivram v. Lotu Sakkaran* ¹ *Govind Bhikaji v. Bhan Gopal* ² and *Rani v. Laxmanrao* ³. The view taken in the present case seems to us to be the more reasonable and that is amply sufficient to secure the safeguards which the law had in view in insisting upon attestation in certain cases.

NAGENDRA NATH SEN v. SADHU RAM MANDAL : I. L. R. 48 C. 65.

Notwithstanding the decision in *Huro Pershad Roy v. Gopal Dass Dutt* ⁴ we feel that there is much to be said for the contrary of what the learned judges have held to be the only reasonable conclusion in this case. The conflict amongst the several pronouncements of the judicial committee dealing with the question whether and how far a plaintiff can invoke the aid of equitable principles or considerations to escape the bar of limitation may be seen from the judgments in *Muthu Korakkai Chetty v. Madar Ammal* ⁵. It is no doubt too late now to contend in terms for any principle of *suspension* not expressly recognised in the Limitation Act. But much the same result can be reached either by theories which would recognise a new cause of action or by so interpreting the third column of particular articles of the Limitation Act as to do substantial justice in the case. Even in *Huro Pershad Roy's* case the judicial committee recognise that if during the period in question there was a time when the rent could not have been recovered, that may result in the plaintiff not suffering the penalty of the bar of limitation during such time. That case is no doubt authority for the proposition that the mere

1 (1919) I. L. R. 44 B. 405.

2. (1916) I. L. R. 41 B. 384.

3 (1908) I. L. R. 33 B. 44.

4. (1882) I. L. R. 9 C. 255 P. C

5. (1919) I. L. R. 48 M. 185 F. B.

pendency of a suit in ejectment by a landholder against his tenant does not save limitation in respect of a claim for rent should the suit in ejectment fail. But while there the claim to eject failed even in the court of first instance we find that in the case under notice the first court has decided the ejectment suit in plaintiff's favour and it cannot be said that between the date of such decree and of its reversal on appeal the plaintiff could have maintained a suit for rent. The learned judges however do not seem to take notice of this distinction.

JANARDAN TRIUMBAK v. MARTAND TRIUMBAK : I. L. R. 45 B. 241.

An appeal against an order staying or refusing to stay execution of a decree is perhaps not a matter of frequent occurrence under the Civil Procedure Code (though otherwise under the Letters Patent,) but the question is one of considerable practical importance. In so far as its determination under the Code of 1908, turns on the omission in S. 47 of the words 'stay of execution' found in S. 244 of the Code of 1882, we may point out that the object of S. 47 is *primarily* to define the matters to be dealt with by the executing Court and it is only incidentally (by virtue of the inclusive definition of 'decree' in S. 2) that it affects the question of appealability. It certainly cannot be said that by reason of the omission the question of stay of execution is now taken away from the executing court and it must be conceded that for this purpose the general words 'all questions ' in §. 47 include this matter as well. If so, it cannot be said that an order relating to stay of execution does not deal with a 'question under S. 47' within the meaning of S. 2, cl 2. To constitute a decree the order must no doubt be a 'determination' but this does not of itself involve the conception that it should be a decision on the rights of parties. It merely connotes an adjudication of the particular question.

We are aware that all orders in execution proceedings are not necessarily appealable by virtue of the definition in S. 2 (2), but we think that this restriction must arise either from the fact that the order is merely administrative, cf. *Swagami Achi v. Subramania Aiyar* ¹ *Ko Tha Huiyin v. Mahnin* ² or from the

1. (1908) I. L. R. 27 M. 249.

2. (1911) I. L. R. 38 C. 717 P. C.

fact that the order is declared to be final or appealable only under S. 104 and O. 43. But it is difficult to find warrant for the view taken in several cases that an order under S. 47, in order to be appealable 'must conclusively determine the rights of the parties.' If this expression however is to be understood in a wide sense, an order staying execution of a decree is as much a Judgment as a temporary injunction pending a suit and the latter has been held to be appealable as a 'Judgment' within the meaning of the Letters Patent. The decision in *Srimantu Raja Yarlagadda Durga Prasada Nayadu v. Srimantu Raja Yarleddda Mallikarjuna Prasada Nayadu*¹ has been disapproved of by the Full Bench in *Tulja Ram Row v. Alagappa Chettiar*² and the practice in Madras ever since has been to recognise a right of appeal against orders on stay applications.

The object of the omission in the new code of the words 'stay of execution' in S. 244 of the old code is by no means clear. But we may point out that those words were inserted in the old code only by the amending Act of 1888, and that even prior thereto, the preponderance of authority was in favour of a right of appeal in such cases. See *Steele & Co. v. Ichchamoyi*³ and the cases therein referred to; See also *Kassamal v. Gopi*⁴ and *Musaji Abdulla & Co. v. Damodaras*⁵. With reference to the suggestion of Macleod, C. J. that a question relating to stay of execution is a matter of *discretion* we would answer in the words of Krishnaswami Aiyar, J. in 35, M. 1, at p. 13, that 'the question of the right of appeal is different from, how a matter of discretion should be dealt with by an appellate court.' It is a ground not for refusing to entertain the appeal but for declining to interfere except on sufficient grounds.

1. (1901) I. L. R. 24 M. 354.

3. (1886) I. L. R. 13 C. 111.

2. (1910) I. L. R. 35 M. 1.

4. (1888) I. L. R. 10 A. 389.

5. (1888) I. L. R. 12 B. 279.

DHADA SAHEB v. MUHAMAD SULTAN SAHEB : I. L. R. 44 M. 167.

The distinction made in this case between a vendee from a Hindu co-parcener and a purchaser from a Mahomedan is, with great respect, not convincing for the case in *Baijnath Lal v. Ramooden Chowdry* is not the case of an alienee from a Hindu co-parcener (see p. 235) but of one taking a mortgage from an ordinary joint owner who may have been member of a joint family but had ceased to be such. It was the case of a mortgage of an eight-anna share in 2 out of 3 villages in which the mortgagors were interested and at a partition by which the Privy Council held the mortgagee was bound a smaller share in the properties mortgaged and the whole of the 3rd village were allotted to the mortgagor. The Sub-Judge held that a particular share in the 3rd village might be taken to represent the deficit and gave a decree in favour of the mortgagee as against that share also. The High court was of opinion that the mortgagee was not entitled to anything outside what was mentioned in his mortgage-deed. Their Lordships held otherwise, "It is certainly possible" their Lordships say at p. 237, "to conceive cases in which the security not covering the undivided share in the whole estate, it might be difficult to determine which of the lands allotted in substitution of the share represented the mortgage premises. No such difficulty, however, exists in the present case inasmuch as the whole of Tajpore Rattanpore (the 3rd village) was allotted to Gopal Narain Singh (mortgagor) on partition. He was already entitled to an eighth undivided share in this Mouza which being excluded from the mortgage is not claimed by the appellant. But it follows from this that whatever portion of this mouza was allotted to him in excess must have been *so allotted in substitution of his interest* in the mouzas G and P and therefore, became subject to the mortgage. The ground on which Their Lordships base the claim of the mortgagee is *substitution*. It is not put on any principle of *warranty*. In fact it is difficult to see how warranty of title on the part of the mortgagor would entitle the mortgagee to insist upon getting other land. No doubt if his security is jeopardised, he may insist upon fresh security being given but that right would not entitle him to pick and choose any particular land as security. Even this right is not possessed by a purchaser to whom also the

principle of the case has been applied in 4 C 510, correctly as we think. The purchaser is entitled to all such properties as are allotted in substitution of or as equivalent of what is mortgaged or sold to him. If it is impossible to say what has been allotted instead, of course his claim goes but if it can be, he gets what is substituted. S. 73 of the Transfer of Property is but an application of this general principle. The principle of that section has been applied to sales. (see 6 M. 344). In 18 M. 316, Domat is quoted in support of the principle. There is no reason why the principle should not apply to court purchasers as well. The absence of warranty in court sales, cannot affect the application of this principle. There may be technical objections to the application of the principle, form of attachment, form of sale, etc. This principle is to be carefully distinguished from that which underlies S. 43 of the Transfer of Property Act. Suppose a sharer mortgages or sells a whole item, whereas he is entitled only to a share therein. If the whole item happens to be allotted to him the purchaser or mortgagee may, relying upon S. 43 have the mortgage or sale upheld in respect of the whole item. In those circumstances, the principle of the decisions above cited may not assist him for the purpose. In 6 C. L. J. 46, Mr. Justice Mookerjee puts 3 cases and examines the working of the principle in each case. First, the case where the whole share of a co-owner in all the properties is mortgaged, second, where a fraction of that share is mortgaged, thirdly where his share in some of the family properties is mortgaged and a part of the property mortgaged and some other part is allotted to the mortgagor. The learned Judge suggests the mode of ascertaining the property substituted for the mortgaged share. A further case not considered by the learned Judge is where a whole item is mortgaged and a part or no part at all of the mortgaged item is allotted but other items are allotted to the mortgagor. Where his proper share in the item is allotted to the mortgagor, it is difficult to see how the mortgagee is entitled to proceed against the other properties because the other properties can in no sense be said to be in substitution of the item mortgaged for ex-hypothesi, he has got whatever the mortgagor was legally entitled in the item. The case would stand on another footing if no portion of the item is assigned to the mortgagor at all for then it could be legitimately said that other property has been

substituted for his interest in the property in question. It may be objected that no individual member of an undivided Hindu family has got any definite interest in any portion of the family property. Nevertheless it cannot be denied that he has interest and the interest becomes fixed at the partition.

PERUMAL AMMAL v. PERUMAL NAIKER : I. L. R. 44 M. 196.

In this case there was an unregistered deed of gift comprising certain mortgage debts, book debts and promissory notes belonging to the donor. Question was how far the gift was good. Their Lordships hold that the gift of mortgage debts was bad but that the gift of the promissory notes and book debts was good. The learned Chief Justice is of opinion that before the amendment of the Transfer of Property Act (1900) a valid assignment of the debt carried with it the mortgage but since then, the mortgage could not be transferred without a registered instrument. The view of the learned Chief Justice on the state of the law previous to the amendment can be supported on intelligible reasons although it is not easy to understand why the legislature should have made a discrimination in favour of this species of immoveable property. What is not easy to understand is the process of reasoning which leads to the conclusion that mortgage debts are not transferable without a registered instrument since the amendment. The law in India did not know all the nice distinction of the English law about assignments for value and gratuitous assignments as regards choses in action nor was it the rule here that choses in action were not assignable and that assignees can sue only in the name of the assignor. S. 9 of the Transfer of Property is clear that writing is not necessary for transfer unless it is so required by any law in that behalf. The Transfer of Property Act does not declare now that mortgage debt cannot be assigned without writing. How is the prohibition to be spelt out? We must confess we prefer the view of Sir V. Bhashyam Aiyangar J. The mortgage qua mortgage is not assignable except as immoveable property. The debt may be assigned as an actionable claim. It will not carry the mortgage along with it as the assignment of a mortgage which is an interest in immoveable property is to be done only as laid down in S. 54 or S. 123 of the Transfer of Property Act.

The decision on the other points involved in the case, is unexceptionable. The chapter on actionable claims is not confined to transfers for value and the language of S. 123 is unsuited to the actionable claims. Hence a gift may be made of an actionable claim in the same manner as any other transfer. There is a difference of opinion in the Madras High Court as to whether promissory notes can be assigned orally but there is no difference of opinion on the question that they *can be assigned in writing*.

On the further question as to whether the fact that the gift is invalid as to mortgage should invalidate the gift as to other properties, there is a section of the Contract Act which prevents title passing in respect of moveable property before the title passes in the immoveable property. But this is confined to sales. No such rule is enacted in the Transfer of Property Act as to gifts. Even as to partition it has been held that there is ordinarily no such interdependence between the validity of the one and that of the other so as to require the setting aside of the one in case the partition is not good in respect of the other. The case of gift is naturally an *a fortiori* one and especially when the gift is to the same person. If the gift of moveables is to one heir and immoveables to another and the upholding the gift in respect of one and not the other would benefit one at the expense of another, there might be some room for holding that they are interdependent.

ABDUL OHAD v. AMDALI GAZI, I. L. R., 48 C. 153.

The conclusion reached by the learned Judges in this case seems to us unexceptionable, but in view of the conflict of decisions on the question involved, we do not feel that the matter is so simple or the authorities so clear as the brevity of the judgment seems to suggest. Cases in which *some* only of the defendants remain *ex parte* or some only prefer an appeal, have long given rise to processual difficulties, in the attempt to deal with them in the light of a general theory, that there can be only *one* decree in a case. Questions have arisen in connection with the rule of limitation governing applications to execute portions of the decree not subject to appeal, (either with reference to the subject matter or with reference to the persons concerned.) The latest decisions on this point leave the law in some degree of uncertainty, basing the conclusion on the nature of the decree in the particular case and the extent to which the decree of the primary court can be regarded as imperilled by the appeal. (See *Christiania Benshawn v. Benarasi Prosad Chowdhury*¹ and *Loka Nath Singh v. Gagu Singh*²). Again, under the provisions relating to review, the right of persons not made parties to an appeal, to apply for review of the lower court's judgment is in terms provided for, by the Code. But even with reference to this provision, difficulties have arisen on account of the wide language of O. 41, R. 4 and R. 33, giving the appellate court power to deal with the decree even as against non-appealing parties (cf. 21, C. W. N. 430.)

The provision in Cl. (2) of O. 47, R. 1 is, however, so far as it goes, a negation of the broadly stated theory, that there can be only one decree in a suit and this is emphasised by the express authorisation (in the new code), that an *ex parte* decree may be set aside either as against the absent persons only or against others as well. The actual decision in *Ramanathan Chettiar v. Narayan Chetti*³ may perhaps be justified on the ground that the appeal as well as the review proceedings were between the same parties, but the decision in *Sankara Bhatler v. Subbaraya Bhatler*⁴ is difficult to support, in so far as it applied the principle too broadly stated in the earlier case, to an application (under S. 108 of the old Code) by a person not a party to the appeal. *Sankara Bhatler v. Subbaraya Bhatler*⁴ is, we

1. (1914) 19 C. W. N. 287.

2. (1915) 22 C. L. J. 338.

3. (1904) I. L. R. 27 M. 602.

4. (1907) I. L. R. 30 M. 535.

find, referred to, in the arguments in the case under notice but not the later Madras decisions where it has practically been dissented from (See *Sadaya Konan v. Annamalai Udayan* ¹ and *Ramachandra Mallayya v. Narasayya Hegade* ². See also *Palaniappa Chetti v. Subramaniya Chetti* ³ which relies on the fact that Ramanathan Chetti's case has been overruled in *Chenna Reddi v. Peddabbi Reddi* ⁴). Some of the Allahabad decisions would seem to follow *Sankara Bhattar's case*—cf. *Raj Gobind Singh v. Behari Pathuk* ⁵ and *Mathura Prasad v. Ramcharan* ⁶ but the later judgment of Sundar Lal, J. in *Gajraj Mali v. Swami Nath Rai* ⁷ explains them and discussing the question at some length, dissents from the earlier Madras case. In *Rifaqat Husain v. Bibi Tawaffi* ⁸ an appeal against an *ex parte* decree had been dismissed for default and Banerji, J., held that in such a case, the original court could deal with an application even by the appellant himself, to set aside the *ex parte* decree.

MANILAL MOTILAL *v.* GOKALDAS ROWJI, I. L. R. 45 B. 245
AND RAJMAL GIRDHARLAL *v.* MARUTI SHIVRAM, I. L. R. 45 B.
329.

The imperfect character of the Indian statute law on the subject of arbitration has led to such conflict of rulings and uncertainty of law, as to render a procedure by arbitration more the beginning of troubles than an end. The two decisions under notice and the case law therein partially reviewed, would suffice to illustrate this. Starting with the doctrine that when a dispute has been brought before one tribunal, its adjudication ought not to be taken away from it except in accordance with some well established rule of procedure, (cf. *Raja of Venkatagiri v. Chinta Reddy* ⁹ and *Sadiq Husain v. Nazir Begam* ¹⁰) there is force in the contention that the subject matter of a pending suit ought not to be made the subject of arbitration, except under an order of Court. But when it is remembered, that a plaintiff can at any time withdraw his suit and that a subsequent reference of the subject matter to arbitration can properly be made the subject of proceedings under rule 20 of

1. (1915) 2 L. W. 529.

3. (1921) 41 M. L. J. 90.

5. (1915) 39 I. C. 247.

7. (1916) I. L. R. 39 A. 13.

9. (1912) I. L. R. 37 M. 408.

2. (1917) 7 L. W. 10

4. (1908) I. L. R. 32 M. 416.

6. (1915) I. L. R. 37 A. 208.

8. (1917) I. L. R. 39 A. 393.

10. (1911) I. L. R. 33 A. 743 (P. C.)

Sch. II to the Code, there is little more than theoretical formalism, in insisting that the subject matter of a pending suit cannot validly be referred to arbitration except through the Court. Nevertheless it seems to us anomalous to hold that an award passed on such a reference cannot be made the subject of an application under R. 20 of Sch. II, but, much the same result as in those proceedings can be attained by an application under O. 23 R. 3. Yet this is the view taken in the majority of recent Indian decisions. With all respect, it is difficult to make the words, 'agreement or compromise' in O. 23, R. 3, include an award, while excluding a mere agreement to refer. cf. *Venkatachala v. Rangiah* ¹. Even if it be possible to bring under these words, cases in which both parties acquiesce in the award, it is scarcely possible to contend, that even where the award is challenged there is an agreement or compromise apart from the original agreement to refer. Nor does it seem to us reasonable to say that an award, e.g., in favour of the plaintiff, which *ex hypothesi*, the defendant is challenging, is the same as, "the defendant satisfying the plaintiff in respect of the subject matter of the suit," within the meaning of that rule. All that the reference in some of the English cases to the analogy of 'accord and satisfaction' seems to imply is, that the award can be pleaded in bar.

In the first case under notice the learned Judges have to recognise, that when a disputed award is made the subject of an application under O. 23, R. 3, the court must determine its validity 'according to the general rules of law governing the validity of awards.' How then does such a proceeding differ from an application under R. 20 of the second schedule? The decision in *Chinna Venkataswamy v. Venkataswami* ² is an extreme application of, O. 23, R. 3, and the trend of Justice Seshagiri Aiyar's reasoning is scarcely reconcilable with the judgment in *Raja of Venkatagiri v. Chinta Reddy* ³.

In the second of the Bombay cases noted at the head, the question arose as to the effect of a refusal by a Court to file an award in an application under R. 20. It was contended that such refusal operated as *res judicata* and precluded reliance upon the award in any subsequent suit. But the learned judges

1. (1911) I. L. R. 36 M. 358.

2. (1919) I. L. R. 47 M. 625.

3. (1912) I. L. R. 37 M. 408.

overruled the contention on the ground, that the former proceeding was not a 'suit' within the meaning of S. 11. While accepting the conclusion in the particular case, we venture to doubt the correctness of the reason assigned; for, according to this reason even an express adjudication against the validity of the award in a proceeding under R. 20 of Sch. II, will be of no avail in a subsequent suit. It is quite true that an application under R. 20 is not obligatory, and again an application under that rule may fail for several reasons and it is not the law, that the mere omission to apply, or the mere fact of the dismissal of an application under that section, will deprive the award of all effect. But on the other hand, the argument that to support a plea of *res judicata* the prior proceeding must formally be described as a 'suit' is no longer tenable in the face of the observations of the Privy Council in *Sheo Pershan Singh v. Ram Nandan Parshad Singh*.¹ Some weight must also be given to the fact, that the code expressly directs an application under R. 20 to be registered as a suit between the applicant as plaintiff and the other parties as defendants and that if the award is ordered to be filed, a *decree shall follow*. It is noteworthy that in *Muhammad Newaz Khan v. Alan Khan*² the Privy Council make a reservation in respect of cases where the point as to the validity of the award is directly put in issue and decided in the proceeding under S. 525 of the old code. See also *Chintamallaya v. Thadi Gangireddi*.³ Under the former Code some of the High Courts had held that against an order refusing to file an award there was no right of appeal, because such an order did not amount to a decree and they were accordingly reluctant to treat any pronouncement in such a proceeding as final and conclusive. In the case of *Kunji Lal v. Durga Prasad*,⁴ the prior order had expressly decided against the award on the merits, on the ground of misconduct and yet, the learned judges allowed the same question to be re-agitated in a subsequent suit to enforce the award. The reasoning in this case and in *Basant Lal v. Kunji Lal*⁵ seems to us, with all respect, to proceed in a vicious circle, *viz.*, that because the order on the application will not be *res judicata* in a subsequent suit, the prior proceeding is not a suit nor the

1. (1916) I. L. R. 43 C. 694 (P. C.)

2. (1891) I. L. R. 18 C. 414 (P. C.)

3. (1896) I. L. R. 20 M. 89.

4. (1910) I. L. R. 32 A. 484.

5. (1905) I. L. R. 28 A. 21.

prior order a decree, and that because the prior proceeding is not a suit, the order passed therein is not a decree and therefore cannot operate as *res judicata*. In *Sahib Charan Das v. Ram Chandra Sarup* ¹ where these decisions are followed, the ground on which the court refused to file the award does not appear from the report. In *Harakh Ram Jani v. Lakshmi Ram Jani* ² also, these decisions were followed, but the learned judges take care to point out that the order in the prior proceeding (which will be found in *Hari Kunwar v. Lakshmi Ram Jain*) ³ did not pronounce against the award so far as it went, but refused to file it only on the ground, that one of the matters referred, has been left undetermined by the award.

MANGALDAS GIRDHARDOS *v.* THE ASSISTANT COLLECTOR OF AHMEDABAD, I. L. R. 45 B. 277.

The position of the Government is to say the least anomalous, when it asserts its own title to property, forming the subject matter of land acquisition proceedings. The point for consideration is not, whether questions of title cannot as between several claimants, be effectively decided in land acquisition proceedings but, whether government, which in these cases, occupies the position of a proposer can make the offer or ask the court to make an award coupled with an assertion of its own title. To mention only one obvious consequence of permitting this course, we may point out that if the question of title is directly raised in a regular suit between the government and the claimant, the claimant, will have a right to carry the matter on second appeal or even to the Privy Council, whereas an adjudication under the Land Acquisition Act is subject to an appeal only to the High Court.

There is however another aspect of the case which we find adverted to in the argument but not in the judgment, *viz.*, whether on the footing that the land belonged to the government and only the superstructure belonged to the claimant, the acquisition of the latter can be described as an acquisition of 'land' within the meaning of the Act. *cf. Shyam Chunder Mardraj v. Secretary of State for India* ⁴.

1. (1911) I. L. R. 33 A. 490.

2. (1920) 18-A. L. J. 980.

3. (1916) I. L. R. 38 A. 380.

4. (1908) I. L. R. 35 C. 521.

NATHURAM SHIV NARAYAN v. DHULARAM HARI RAM, I. L. R. 45 B. 292.

This case seems to us, a rather extreme instance of interference under S. 25 of the Provincial Small Cause Courts Act. We quite admit the salutariness of a watchful control by the High Court over the proceedings of Small Cause Courts, and there can be no doubt that the powers under S. 25 of the Act were meant to be wider than those under S. 622 of the old Civil Procedure Code. The select committee expressly referred to the Privy Council decision in *Amir Hassan Khan v. Sheo Baksh Singh* ¹ and stated that it was their intention to make the powers under S. 25 wider. But it nevertheless seems to us too much to say that the High Court can interfere under the Act even with a finding of fact, whenever it feels that an injustice has been done, or that a clear misappreciation of evidence brings the decree of the lower court within the description, that it is not 'according to law'. We do not know if it was meant to make any distinction between this expression and the provision in respect of second appeals, viz. as to a 'decision being contrary to law, and yet the Privy Council have very strictly limited the power of the High Court to interfere in second appeal, with findings of fact. See *Durga Chowdhrafi v. Jewahir Singh Chowdhri* ² and *Nafar Chandra Pal Chowdhury Shukur Sheikh* ³.

1. (1884) I. L. R. 11 C. 6 (P. C.)

2. (1890) I. L. R. 18 C. 23 (P. C.)

3. (1918) I. L. R. 46 C. 189 (P. C.)

NATARAJA THAMBIAN v. KAILASAM PILLAI, : I. L. R. 44 M. 283 (P. C.)

In this case their Lordships regard the question as to whether the matadhipathy is a trustee of the mutt properties or not as a question of fact, that is to say, they throw the onus of showing that the mutt property is trust property on the party alleging it. But the main question discussed is the validity of the appointment of the matadhipathy to whom as such matadhipathy, the trusteeship of the devastanams in question belonged. They accept the proposition that an appointment made in furtherance of the interests of the holder for the time being and not *bona fide* in the interests of the institution itself is invalid. The appointment, their Lordships find on the evidence to have been made by the mutadhipathy solely in his own interests as the result of a compromise by which he avoided the risks of a criminal prosecution for forgery of the alleged will of which he had unsuccessfully attempted registration. Their Lordships consider that it is quite unnecessary to go into the question whether the charge was well or ill-founded. The question they consider is what weighed with appointer the interests of the institution or considerations of his own protection. If the latter the appointment was not *bona fide* in the interests of the mutt. The question as to the fitness of the appointee to the office is not considered. What would happen if considerations personal to the appointer had weighed with him only in the same degree as the interests of the institution? It could not then be said that the appointment was done solely in his own interests. Investigation of this kind must involve psychological questions of certain amount of nicety and if strictly pursued, we are not certain if it may not lead to the invalidation of a lot of appointments which are made so often in consideration of the relationship of the appointee to the appointer.

RADHAKRISHNA AYYAR v. SWAMINADHA AIYAR, : I. L. R. 44 M. 293 (P. C.)

In this case their Lordships impress upon the High Courts the necessity of stating the precise ground on which they give leave to appeal to the Privy Council under S. 109, cl. (c). Their Lordships would seem to confine it to cases in which it is impossible to define in money value the exact character of the

dispute as for example those relating to religious rites and ceremonies, to caste and family rights or such matters as the reduction of the capital of companies as well as questions of wide public importance in which the subject matter in dispute cannot be reduced into actual terms of money. The question in the case was as to whether under S. 52, cl. (3) of the Estates Land Act, a patta *decreed under the old Rent Recovery act* continues in force till a new patta is exchanged or decreed or whether that effect is given only to pattas decreed under the Estates Land Act. Their Lordships did not think the point to be of sufficient weight to justify granting of special leave.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL *v.*
SRINIVASACHARIAR, I. L. R. 44 M. 421 (P. C.)

In this case the Privy Council reverse the judgment of the High Court in I. L. R. 40 M. 268 where the Madras High Court held that the holder of an enfranchised shrotriam inam did not acquire the right to quarry minerals as against the Government. The judgment does not decide the case on any general principle applicable to all cases. They construe the original grant which was a grant for subsistence by enjoyment of the produce of the seasons. The grant was not couched in the language of ordinary out and out-grants with ashtabhogam. The grant according to their Lordships amounted to a grant of smaller interest out of the interest possessed by the Government. The Inam title-deed contained the words grant in freehold. Had the case stood there their Lordships would have concurred with the High Court but with the original grant before them and having regard to the fact that the Act IV of 1869 made it clear that the subject matter of the grant was not extended by the Inam title-deed, their Lordships felt bound to hold that the right to minerals did not pass. Their Lordships do not lay down that in the case of no inam minerals pass to the grantee. The question would be one to be decided on the terms of the grant and having regard to all the circumstances of the case.

MEENAKSHI ACHI v. SOMASUNDARAM PILLAI : I. L. R. 44 M. 205.

Though according to the texts, *Yogakshema* is indivisible, several of the recognised commentators and apparently even one of the Smriti writers has recognised enjoyment by rotation by the heirs. The term *yogakshema* in its technical connotation seems to include both religious and secular acts of charity. These are recognised by Vijnaneshwara to be indivisible. The Smriti Chandrika, on the other hand, (Chap VII S. 43) seems to regard the rule as one laid down by inconsiderate Smritikars and lays down that they are partible. Vyavahara Mayukha cites a text of Katyayana (Ss. 7, 43) which prescribes that Vrittis and religious endowments should be enjoyed by the heirs in turns and seems to apply the rule to all works of *Yogakshema*. Vivadaratnakara (Chap VII) including hereditary offices in the term *Yogakshema* prescribes an equal division of the emoluments of a hereditary office. So that it will be found that while admitting the rule of impartiality a custom seems to be recognised as growing or grown permitting enjoyment of these offices by turns. Taking the wider interpretation accepted by the commentators, *Yogakshema* does not seem to refer to any but endowments by the family or endowments in which the family has a beneficial interest. There does seem to be this justification for the view taken in *Chenna Keshavaraja v. Vaidilinga*¹ and *Seturamaswamier v. Meruswamier*². There does not seem to be any such strong and uniform current of authority in favour of the opposite view. In *Ramanathan Chetty v. Murugappa Chetty*³ this point does not seem to have been contested and there is no considered decision on the question. In Malabar, though a Tarwad is divided, still the uralanship vests in the senior most member of all the component Tarwads and not in the body composed of the Karnavans of the new Tarwads. On the lines suggested by the authorities, a distinction ought to be made, we think, between charitable and religious foundations by private individuals and those by the public or by the Government *i. e.*, to say where there is a public grant. In the latter class of cases, trusteeship should devolve only on single individuals and not on the entire family. It will be found that as a matter of

1. (1877) I L. R. 1 M. 843.

2. (1917) I. L. R. 41 M. 296 (P.C.)

3. (1895) I. L. R. 20 B. 495.

4. (1906) I L. R. 29 M. 283.

fact practice accords very largely with the rule suggested. The distinction is not one between private trusts and public trusts but between endowments by private parties and those by the public or the Crown. In the former cases the general rule of Hindu Law as to founder's heirs would apply; in the latter, the rule of indivisibility and devolution on a single heir.

VENKATACHARYULU v. VENKATALAKSHMAMMA : I. L. R. 44 M. 214.

Is there a pious obligation on the part of a Hindu son to pay for the misconduct or negligence of his father who was employed as an agent? This case says there is. *Rina* in its primary sense, means only a debt or loan (see *Chhakuri Mahton v. Ganga Prasad* ¹, But even Jagannatha recognises that the word is used only in a secondary sense in rules such as, "he who takes the assets shall be compelled to pay the debts," and that the word in that context includes payment on demand and the like. Mr. Justice Mahomed in *Janki v. Nand Ram* ² suggests that it includes all classes of obligations. He would include moral obligations such as duty to maintain an indigent daughter-in-law, duty to provide for the marriage of a daughter and so forth. In Nanomi Babusin's case *Nanomi Babusin v. Moddun Mohun* ³ the Privy Council upheld a sale in execution of a decree for mesne profits against the father. But it would be hardly right to regard these as a clear authorities for the liability had its origin in a loan transaction and the liability was regarded as a joint family liability. In *Pareman Doss v. Bhatler Mahton* ⁴ the inclination of their Lordships is against regarding liability for damages as a *debt Rina*. In *Natesayyan v. Ponnusami* ⁵ the sons were held liable for amounts collected by the father which he was bound to account to a co-sharer of his vendor against whom this all was held not binding. There are some wide remarks about pious obligation. In *Kanemer Venkappaya v. Krishnacharya* ⁶ a son was held liable for in respect of collections by the father as the Manager of a kuri which he was bound under the kuri contract to hand over to the plaintiff. There the Kuri contract was found to be for the benefit of the family. It was not necessary to refer to pious obligation to support the claim against the son; in fact the decree is not based on the pious obligation

1. (1914) I. L. R. 39 C. 862 at p. 875. 2. (1888) I. L. R. 11 A. and 194 at 214.

3. (1888) I. L. R. 13 C. 21.

4. (1897) I. L. R. 24 Cal. 672.

5. (1812) I. L. R. 16 M. 99.

6. (1907) I. L. R. 31 M. 161.

In *Gurunatham Chetty v. Raghavulu Chetty*,¹ the son was held liable for the amounts the father had to account as an administrator. No criminal misappropriation was found in the case. In *McDonnell v. Raghava Chetty*² a mortgage had been given by the father making the property liable for amounts found due by him as cashier and for the due fulfilment of his duties as a cashier. The cashier misappropriated the funds and their Lordships held that the sons were not liable for the amounts. The ground on which the exemption is put is not that it is not a *Runa* but that the obligation was the result of an offence—a dishonest misappropriation. No doubt there was a civil liability to pay the money. If he took the money, which as a shroff he was not entitled to he would be guilty of a criminal offence. This liability in so far as it related to the amount taken would be the result of a *criminal* default; in other words the agreement was an agreement not to commit a crime. The rule of the law could not be got rid of by a technical device. Notwithstanding the language used in *Medai Tirumalappa v. Veerabadra*,³ we should think that on principle a son cannot be made liable when the father as agent could not use the money and his use of the money itself would be criminal. The liability of the father on the principle of tracing is a liability independent of the crime and there is no reason why the son should not be held liable for it. In P. R. 374, no 128 of 1879, it is held that a decree against the father for the value of a stolen property is executable against the sons. This also seems to be getting round the rule. Mr. Justice Mookherjee is inclined in *Chhakauri Mahlon v. Ganga Prasad*⁴ to take the view that the liability imposed by the court upon the father to indemnify the person with whose property he had interfered creates a debt—provided the interference does not amount to a criminal offence. The extent to which this could be carried depends on the interpretation the court is prepared to put on the word *Avyavakarika*. There is a tendency on the part of the courts to narrow its scope which is to be regretted. There is no reason why the courts should be specially anxious to extend the creditor's remedies against the son. The liability of the son for the debts of the father is a restriction on the

1. (1908) I. L. R. 31 M. 472.
 3. (1909) I. L. R. 19 M. L. J. 759.

2. (1904) I. L. R. 27 M. 71,
 4. (1912) I. L. R. 39 Cal. 862.

admitted proprietary rights of the son and should not be lightly extended. It is perfectly clear that the latest tendency of the Privy Council is in the direction indicated by us. If *Sahu Ram Chandra v. Bheep Singh* ¹. Now suppose the father alienates property and the sale is set aside on the ground that the sale is not for an antecedent debt. Nevertheless are the sons to be liable on the father's covenant for title? If the son is to be held liable we think that that "would be equivalent to sanctioning a plain and deliberate breach of trust".

SINGARIAH CHETTY *v.* CHINNABHI : I. L. R. 44 M. 268.

With all respect, we think this decision goes too far. The point that is overlooked is that orders on claims have not the same effect as *res judicata* under S. 11 C. P. C. All that the court has to inquire into is as to who was in possession at the time of the attachment. It may not make an inquiry at all if the claim was designedly or unnecessarily delayed.* The orders that it passes are one of disallowing the claim or raising the attachment or modifying the attachment. These orders are conclusive subject to the result of a suit by the defeated party to establish the right he claims and the judgment in the suit so brought may have all the consequences of an ordinary decision *Ranasamy Chetty v. Aligiri Chetty* ² because S. 11 C. P. C. gives conclusive effect to decisions on issues. So far as the order on the claim is concerned, its effect is to establish the particular attachment or to cancel it. It is not the policy of the Act to give the benefit of an attachment to all creditors subsequently attaching or for the matter of that even to the same creditor seeking to attach the property in respect of the same decree *Mina Kumari Bibi v. Bijoy Singh Dudhuria* ³. The order is not conclusive as to other properties *Denkar Ballal v. Hari Shridhar Apte* ⁴. *Radha Prasad Singh v. Lal Sahab Rai* ⁵. If the amount of the decree is paid off or the attachment is withdrawn the order need not be set aside *Krishna Prasad Roy v. Bipin Behary Roy* ⁶ *Ibrahimbai v. Kabulabhai* ⁷ *Gopal Purshotam v. Bai Divali* ⁸. Why it should have a different effect if the payment is made or the attachment is withdrawn after one year when the property is attached in execution of a different decree it is difficult to see.

1. (1915) I. L. R. 39 All. 437.

3. (1917) I. L. R. 44 Cal. 622.

5. (1891) I. L. R. 18 A 53 at 62.

7. (1889) I. L. R. 13 B. 72.

2. (1915) 27 I. C. 800.

4. (1890) I. L. R. 14 B. 206.

6. (1904) I. L. R. 31 Cal. 228.

8. (1894) I. L. R. 18 B. 241.

SAYYAPUREDDI CHINNAYYA v. THE KING-EMPEROR : I. L. R. 44 M. 297 (P. C.)

The point in this case was an obvious one. The High Court had plainly gone wrong. But the further important question was as to what should be done next. Their Lordships hold apparently following *R. V. William Henry Ball* (1911) A. C. 47 that they have power to remit the case to the High Court for a reconsideration in the light of their Lordships' decision on the point involved. It may thus be taken that the power to remit is a part of the appellate jurisdiction.

NARANDAS RAGHUNATHDAS v. SHANTILAL BHOLABAI : I. L. R. 45 B. 377.

CHARANDAS CHATURBHUI v. CHAGANLAL PITAMBARDAS : I. L. R. 45 B. 428.

These two cases illustrate the difficulty of framing a satisfactory definition of the term 'Judgment' in cl. 15 of the Letters Patent and of applying the suggested definitions to individual cases. In the first case, the learned Trial Judge had, we may assume, improperly granted to the plaintiff liberty to withdraw his suit and bring a fresh suit. The permission to sue again is no doubt a real grievance to the defendant especially as all the High Courts are now agreed that the validity of such permission cannot be attacked in the subsequent suit. If it were a case in the mofussil, the propriety of the order could be challenged by proceedings in revision where the court could be shown to have acted without jurisdiction or with material irregularity. The absence of even this remedy, in cases before the High Court on its Original Side, seems naturally to have led the learned Judges to give a wide scope to the right of appeal. But it is not easy to bring the order in this case within any well-understood significance of the term 'judgment'. Taking it that the word need not be confined to adjudications on the merits of a dispute (whether final or even temporary), the order must at least bring about the termination of the pending proceeding (cf. *Tuljaram Row v. Alagappa Chettiar* 1.) In the present case, the pending proceeding is brought to an end by the plaintiff's action, viz., his withdrawal and the court's leave relates only to the future suit. In the second of the cases noted above, the question before the Trial Judge (in substance)

1. (1910) I. L. R. 35 M. 1.

was whether in the pending suit the defendant could also claim an adjudication of his claim against a third party who had appeared in response to a summons under the third party procedure. The final refusal of the court to adjudicate thereon seems to us more akin to a judgment and as such appealable than the order in the previous case, because it is at least similar to an order rejecting or returning a plaint instanced by Krishnaswami Aiyar, J. in *Tuljaram Row's case*. But the learned Judges here preferred to follow the narrow definition given in *The justices of the Peace for Calcutta v. The Oriental Gas Company*¹ and held that no appeal lay.

BAPU TATYA v. BALA RAVJI : I. L. R. 45 B. 446.

The decision in this case is no doubt in accordance with that of the three judges of the Madras High Court in *Doraiswami v. Nondiswami*;² but we see here no attempt to deal with the considerations urged in the dissenting judgment of Sundara Aiyar, J. in the Madras Case. If the question is to be determined solely with reference to the language of S. 7 of the Limitation Act of 1908 (corresponding to S. 8 of the Limitation Act of 1877) the decision may be right. But, if, as held by Sundara Iyer, J., that section has really to be read with the preceding section and both of them have to be applied only to cases in which but for their operation, limitation as provided for in the third column of the Schedule would have commenced to run even during the disability, they cannot govern suits falling under Art. 44, because under it the period of limitation is to be reckoned only from the date of majority. The question is not, (as Sadasiva Aiyar, J. in the Madras Case seems to assume) whether even during the minority of the ward there *accrues a cause of action* to set aside the guardian's alienation but, whether (in the words of S. 6 of Act IX of 1908) there is a disability 'at the time from which the period of limitation is to be reckoned'. This last condition is *ex hypothesi* inappropriate to a suit under Art. 44 and we are unable to agree with Abdur Rahim, J. (in the Madras Case) that this article is merely an illustration of the application of S. 6. When the succeeding section refers to a disability, the natural meaning there also, seems to us to be a disability at the time from which limitation is to be reckoned.

1. (1872) 8 B. L. R. 433.

2. (1921) I. L. R. 38 M. 118.

Macleod, C. J. in the present case, as well as Sadasiva Aiyar, J. in the Madras Case lay stress on the fact that if a suit to set aside the sale had been brought during the younger brother's minority either by the elder brother or by a new guardian, the decision therein would have bound the younger minor. It is submitted that this test furnishes no safe basis for the determination of the question of limitation. Even in a case where a *sole* minor is concerned, a suit *can* be brought by his guardian and any decision therein will (in the absence of negligence etc.) bind the minor. But that does not deprive the minor, when there has been no suit by his guardian, of the privilege of suing within three years of his majority. Even as between a widow and a reversioner, the reversioner has a fresh starting point under Art. 141 from the date of the widow's death, but that does not prevent an adjudication in a suit by the widow herself against a stranger being *res judicata* for or against the reversioner as well ; and in *Hari Nath v. Mothuramolun Goswami*¹ the Judicial Committee applied this rule even to an adjudication on the ground of limitation.

BABUSING RAMCHANDRA *v.* PANDU : I. L. R. 45 B. 508.

The acquisition of a permanent tenancy by prescription is now possible either under Art. 134 or Art. 144 of the Limitation Act ; but some observations in the recent judgment of the judicial Committee in *Sri Vidya Varuthi Thirtha Swami v. Balusami*² would seem to suggest that the mere covenant to pay rent as distinguished from premium etc., may not be valuable consideration within the meaning of Art. 134. Where the case falls to be decided under Art. 144, it is not clearly established what exactly will constitute adverse possession as between landlord and tenant while a tenancy is *still subsisting*. Where the tenancy has been terminated, the case will be governed by Art. 139. In the present judgment the learned judges use language more guarded than that employed in some of the earlier Bombay cases and more in consonance with the observations of the Madras High Court in *Narasayya v. Raja of Venkatagiri*³. But leaving alone cases where the tenant enters into possession without a valid title, *e.g.*, under a lessor who has no title or under a document which purports to create permanent rights

1. (1898) I. L. R. 21 C. 8. (P. C.)

2. (1921) 41 M. L. J. 346.

3. (1910) I. L. R. 37 M. 1.

but is invalid for want of registration etc., it is not easy to define the course of conduct on the part of the tenant which while not leading to a termination of the tenancy itself will make his possession *pro tanto* adverse to the landlord. It has now been settled that the mere assertion of a right of permanent tenancy does not work a forfeiture and as long as a tenant continues to pay rents there is no reason why the landlord should be obliged to eject him on pain of losing his right to do so at a later date. Where however the landlord claims to enhance the rent or to eject the tenant and the latter resists the claim on the plea that he is a permanent tenant and as such bound to pay only a fixed rate, it may happen in some cases that the matter is not then and there carried to an adjudication by a civil court but the landlord continues to receive rent as before; the question would then arise whether such conduct should only be held to create a tenancy from year to year or be held to convert the tenant's possession into one adverse to the landlord to the extent of the interest claimed by the tenant. It must be admitted that the rule of estoppel does not preclude the assertion of a permanent tenancy, for this does not involve a denial of the 'title' of the landlord to the property. But if it be the correct view that in all cases where possession has commenced under a valid tenancy Art. 139 is the only article governing a suit for possession and that the residuary Art. (144) is excluded by the presence of another specific provision (cf *Seshanma v. Chickayya* ¹ it would follow that there is no scope for the application of the rule of adverse possession to the case. Where it is not possible to imply such assent of the landlord to the tenant's claim as to support an inference of a permanent tenancy by *implied agreement* (to the extent to which this is permissible under the Transfer of Property Act), the presumption of a tenancy from year to year is supported by the observation of Lord Selborne in *Magdalen Hospital v. Knotts* (4 A. C. 324). Some considerations against this view are pointed out in *Narasayya v. Venkatramana* ² but their force is weakened by the decision in *Sri Vidya Varuthi's case*, where the Privy Council have held that no permanent tenancy had been acquired, notwithstanding the fact that the tenant continued to pay rent under the *claim* of permanent lease.

1. (1901) L.L. R. 25 M. 507.

2. (1912) 23 M. L. J. 260.

BASVANAPPA v. KRISHNADAS : I. L. R. 45 B. 443.

Beyond expressing their opinion that the view taken in *Mira Mohidin Rowther v. Nallaperumal Pillai*¹ would lead to inequitable and extraordinary results the learned judges vouchsafe no reason for taking the words 'the court' in S. 4 of the Limitation Act to mean *any* court and not the *proper* court. That a view may in some cases lead to possible hardship is no reason for departing from the natural meaning of the section. *Mira Mohidin Rowther's* case has been consistently followed in Madras (see *Ummathu v. Pathumma*² and the cases there cited) and the same view seems to prevail in the other High Courts as well. (cf *Abhoychurn Chukerbutty v. Gourmohun Dutt*³, *Haridas Roy v. Saratchandra Deo*⁴ and *Makund Ram v. Ram Raj*⁵.)

HAR NARAYAN v. SURJA KUNWARI : I. L. R. 43 A. 291 P. C.

The question in this case was as to whether a will gave a property to the family deity who was the donee or conferred only a charge in favour of the deity. The will provided that the property shall be considered the property of the idol, but it further provided that "nothing more nor less than what is at present done shall be done" and "whatever will remain after meeting the expense of the Thakurduvara, the costs of repairs and the pay of servants shall be spent in the estate and that the Managers should continue management at present and our successors should be maintained as they are at present." At another place, it provided that whatever may be saved shall be used by our legal heirs to meet their own expenses." The contemplated expenses of the deity was not more than Rs. 500. In these circumstances their Lordships held that the will created only a charge in favour of the deity. On this question which arises frequently in this country, there are two lines of cases, one, of which *Sonatun Byasack v. Sreemuthy Juggut Sundari Dasi*⁶, and *Ashutosh Dutt v. Durgo Charan Chatterji*⁷, are typical examples, the other, of which the latest is *Jadu Nath Singh v. Thakur Sila Raji*⁸. In the former it was held that only a charge was created while in the latter the

1. (1911) I. L. R. 86 M. 131.

3. (1918) 24 W. R. 26.

5. (1916) 14 A. L. J. 310.

7. (1879) I. L. R. 5 C. 348.

2. (1921) 41 M. L. J. 84.

4. (1913) 18 I. C. 121.

6. (1859) 8 M. L. A. 66.

8. (1917) I. L. R. 39 All. 553.

whole estate was held to be conferred on the deity. The question is not one in which a "fixed and absolute rule can be set up derived alone from the use of particular terms in one portion of the will" but "be settled by a conspectus of the entire provisions of the will". The question is as has been put in several Wakf cases—whether there has been a substantial dedication to the deity. If there is, the property will belong to the deity; the secular beneficiaries may be charge holders, where there is no such substantial dedication the deity will get only a charge in respect of the specified expenditure.

GHULAM ABBAS KHAN v. BIBI AMATUL FATIMA I. L. R. 43 ALL, 297.

In the case of impartible estates which descend to a single heir according to family custom, when the property changes hands by alienation, it is no longer subject to the rule of impartibility and single heirship because the custom is a custom attaching to the family of the holders and not to the estate. A somewhat similar question arose in this case where the estate descended to a single heir according to the rule of primogeniture under a sanad granted by the Government. The sanad conferred the Taluqdari estate upon the grantee and her heirs for ever subject to the payment of revenue, "in the event of the grantee dying intestate, the estate to descend to the nearest male heir according to the rule of primogeniture" "but the grantee and all your successors shall have full power to alienate". The grantee devised the estate in favour of her half-brother who in his turn, disposed of partly by gift-deed and partly by will in favour of his wife, he having no male issue. On the death of the lady the question arose as between her daughters and daughters' children *inter se* as to who was to take the estate. The question turned on the proper significance to be attached to the word successors, whether it included the *alienees*. Their Lordships hold that it does not include them but it is confined to persons who take the estate according to the rule of succession provided in the sanad. If the designated parties were the objects of the gift or devise, their Lordships think that they will be bound. They cannot according to their Lordships escape the obligations of the grant by having acquired the property through other means than succession.

SUKHI v. GHULAM SAFDAR KHAN I. L. R. 43 ALL. 469 P.C.

According to *Het Ram's case*¹ the penalty imposed upon the mortgagees who bring a suit upon their mortgage without making the necessary parties and get an order absolute is to lose the priorities conferred by their security. If the mortgagee purchased the equity of redemption and there was an intermediate mortgagee the intermediate mortgagee would be entitled to sell the property without reference to the intervening mortgage. That is the view taken of the effect of *Het Ram's case* in this case. Their Lordships explain *Matrumal v. Durga Kunwar*² which at the first blush, might seem to sound to the contrary, as a case when the plaintiff in the case offered to pay the amount allowed in the prior decree and the Privy Council had not to decide whether even that amount should be paid at all. But their Lordships are clear that under the Civil Procedure Code of 1908 order absolute for sale or foreclosure has not the effect similar orders had under the Transfer of Property Act, and that it is open to the purchaser to set up the prior mortgage as a shield precisely to the same extent as he could have done so before the Transfer of Property Act. There is one curious point decided in the case which calls for notice. In this case, there were two mortgages. The first mortgagee brought a suit for sale without making the second mortgagee a party, got a decree and purchased the property himself. This was after the Transfer of Property Act and before the New Civil Procedure Code. The purchaser sold it to another who mortgaged the property to the former for the payment of an annuity which formed consideration for the sale. The second mortgagee then sued the latter without making the former a party and got a decree for foreclosure on payment of the amount of the earlier mortgage. Then the suit was brought by the annuitant for the annuity. The defendant set up as a shield his mortgage as well as the previous mortgage which he had paid. The High Court held that the plaintiff was bound to pay both the amounts. If the argument proceeded on the lines of *Het Ram's case* the first mortgagee had lost his right to set up his mortgage and therefore the defendant would not have been entitled to set up such payment by reason of his paying it to the first mortgagee. That is to say, the plaintiff would have been

1. I. L. R. 40 All. 407. (P. C.)

2. I. L. R. 42 All. 364.

bound to pay only the amount of the 2nd mortgage. But their Lordships make the further order that the defendant should pay to the plaintiff the amount of the first mortgage. The ground for the decision according to their Lordships is "whether the decision of the Court that the sum in the prior mortgages should be made a condition of the decree in the suit was right or wrong is immaterial for the present defendants acquiesced in and paid under the judgment. If the widow had been made a party she would have been entitled in the right of her mortgage to that amount. She was not made a party and the result was that owing to the laches of the defendants the mortgagors were allowed to take away the amount which represented part of the estate mortgaged to her. It is the duty of the Court to give the plaintiff the opportunity of occupying the position which she would have occupied if she had been a party to the former suit. The defendant must therefore pay that amount to the plaintiff." In other words, she was held entitled to the benefits of the previous litigation without any inconveniences flowing therefrom.

• APPAYASAMI NAICKER *v.* MIDNAPORE ZAMINDARI COMPANY
I. L. R. 44 M, 575 P. C.

In this case, the question was whether the Palayam of Kannivadi was inalienable. Though an issue raised the question whether the estate was inalienable by reason of custom or by reason of the military tenure on which it was held inalienability on the basis of custom was abandoned and the only ground on which it was put was the nature of the tenure. The estate was held originally on service tenure and if it continued such their Lordships say that "there is good reason for holding that no one of the successive tenants could deal with the land so as to deprive the next holder of the source from which his duties might be discharged". But their Lordships held that the palayam was released from the obligation of military service by the proclamation of Lord Clive in 1809. By implication their Lordships hold that immediately on the release, the property became alienable.

DUNDAPPA v. BHIMAWA : I. L. R. 45 B. 557.

The learned Judges seem to state it as a matter of general Hindu Law (and not any special custom of the locality) that 'there can be very little doubt that amongst sudras the illegitimate daughters succeed as heirs to their mother in default of any nearer heirs' and they rely on a passage in Mr. Ghose's Hindu Law. This view is no doubt in accordance with the remarks in *Mayna Bai v. Uttaram* ¹ but in *Minakshi v. Muniandi* ² Oldfield and Seshagiri Iyer, JJ. held that illegitimate children have no rights of inheritance under the Mitakshara system except so far as the texts specially provide for them and they were not prepared to hold that the word 'daughter' as used in the texts comprehended an illegitimate daughter, even in determining the succession to the stridhanam of a Sudra woman. In *Subbramanya Aiyar v. Ratnavelu Chetti*. ³ the reasoning of Sadasiva Aiyar, J. in the Order of Reference and of Kumarasami Sastri, J. in the Full Bench proceeds no doubt on wider lines but the Judgment of Oldfield, J. and even that of Wallis, C. J. to some extent rest on the logical deduction flowing from the decision of the Privy Council in *Jogendro Bhupati v. Nityanand* ⁴. None of the learned Judges dissent from *Minakshi v. Muniandi* ² and even Sastriar J. (by the reservation towards the end of his Judgment) would seem to recognise that females can come in only under special texts. The authorities in favour of the illegitimate daughter's right of succession are collected in *Kasturi v. Major Loli* ⁵

CHHOTALAL KARSANDAS v. VISHNU GANESH : I. L. R. 45 B. 597.

A person who lent money to pay off a subsisting mortgage took a mortgage bond which proved inoperative for want of attestation. Though the invalid bond cannot itself operate as a charge, the learned Judges recognise that in the circumstances the lender was entitled to an equitable charge for the sum utilised in the discharge of the prior mortgage. But they hold that his suit to recover the money by sale of the property is not governed by Art 132 of the Limitation Act, because he must first obtain a decree declaring his right to a

1. (1864) 2 M. H. C. R. 196.

2. (1914) I. L. R. 38 M. 1144.

3. (1917) I. L. R. 41 M. 44.

4. (1891) I. L. R. 18 C. 151.

5. (1920) 56 I. C. 952.

charge on the property and for this purpose he must sue within six years under Art. 120. We are with all respect unable to agree with this view. The basis on which the doctrine of equitable subrogation has been rested is that the mortgage which is *in fact* paid off is in law deemed to be kept alive for the benefit of the person whose money goes to discharge it and the decision of the Privy Council in *Mahomed Ibrahim Hossein v. Ambika Prasad*¹ proceeds on the footing that the enforcement of this equitable right stands, for purposes of limitation on the same footing as the enforcement of the original mortgage on whose discharge the equity arose. If this be the true view, it is difficult to see why (as the learned Judges say) a declaratory decree is a pre-requisite to the court exercising its jurisdiction over the property; for, after all, the court can only declare *existing* rights and the equitable charge which is to be declared by the court can (as between the parties) be said to exist as much at the date of suit as after the declaration by the court.

SAKHARAM DAJI *v.* GANU RAGHU : I. L. R. 45 B. 683.

This decision seems to us to rest on a rather extreme application of S. 92 C. P. C. The suit was brought by certain Pujaris against another set of temple servants to determine the right respectively claimed by them to appropriate to themselves the offerings made to the deity. It is certainly not the policy of the code that every suit which may in any manner affect the interests of a public religious or charitable trust should be instituted only after obtaining the consent of the Advocate general or the collector. Stress has been laid on certain admissions as to the initial right of the temple itself to the offerings in question and on a prior scheme framed by the court in a suit under S. 539. So far as we are able to gather from the report, the former scheme made no specific provision as to the subject matter of the present suit but only laid down what would otherwise be implied by the general law itself, *i.e.*, that the administration of the funds of the temple should be carried on by the trustees. It seems to us too much to apply the principle of *Ramadoss v. Hanumantha Row*² to a case of that kind. The claim of the plaintiffs rested on an assertion of individual private right, as

1. (1912) I. L. R. 89 C. 527.

2. (1911) I. L. R. 36 M. 364.

against the institution itself and that seems to us no more a question under S. 92 than a claim by a creditor or servant of the temple to be paid out of temple funds. There appears even less reason to bring the present case under S. 92 than existed in *Venkatramana Ayyangar v. Kasturiranga Aiyangar* ¹.

SONUBAI v. SHIVAJI RAO I. L. R. 45 B. 648.

There is abundant authority in the other High Courts for the view taken in *Somayya v. Subbamma* ² that the power of the Court to restore a case dismissed for default or to set aside an ex parte decree is not limited to the circumstances provided for by O. 9, Rr. 9 and 13 or O. 41, R. 19 of the Code. But so far as Madras is concerned *Somayya v. Subbamma* ² has been expressly overruled and the theory of inherent powers negatived by the Full Bench in *Neelaveni v. Narayana Reddi* ³ and the party, in circumstances like those of the present case must invoke the aid of some other principle or form of procedure. In *Adyapadi v. Krishna* ⁴ Oldfield, J. held that gross negligence of the next friend is a ground entitling the court to set aside an order dismissing a suit for default, but we presume that this can no longer be regarded as good law, after the Full Bench decision. The principle of *Debi Baksh Singh v. Habib Shah* ⁵ can if at all, be pressed into service only if the next friend or guardian has died or otherwise become incompetent to act.

MIDNAPORE ZEMINDARI COMPANY v. NARESH NARAYAN ROY : I. L. R. 48 C. 460 (P. C.)

Apart from the determination of the question raised on the terms of the particular grant this decision has a notable bearing on an aspect of the law of *res judicata* which has latterly given rise to a diversity of judicial opinion in this Presidency. In a former suit in ejectment, a tenant had pleaded an occupancy right but this was expressly negatived both by the trial court and by the High Court. That suit had nevertheless been dismissed as premature. Their Lordships hold that this finding against the claim of occupancy right will not 'found an

1 (1916) I. L. R. 40 M. 212

2 (1903) I. L. R. 36 M. 599.

3. (1919) I. L. R. 43 M. 94.

4 (1914) 27 M. L. J. 167.

5. (1913) I. L. R. 35 A 331 (P. C.)

actual plea of *res judicata*, for the defendants, having succeeded on the other plea, had no occasion to go further as to the finding against them.' In this view the decision in *Ramakrishna Naidu v. Krishnaswami Naidu* ¹ would seem to go too far. It is however worthy of notice that the Privy Council add that the former finding 'certainly creates a paramount duty on the appellants (*i.e.*, the tenants) to displace the finding'. But it is not clear what exactly is the principle underlying this observation, if it is to be understood as according to the prior determination something more than a mere evidentiary value.

BISWANATH PRASAD *v.* CHANDRA NARAYAN CHOWDHURY:
I. L. R. 48 C. 509 (P. C.)

In this case, the courts found that in the specific item of property included in the document merely for purposes of registration in a particular place, the mortgagor had no interest and also that the parties never intended that it should form part of the security. But the exception made with reference to cases where the parties intend to include a property in the transfer but that intention fails because of the absence of a good title in the transferor shows that in determining the propriety of registration in a particular registry, the main question is the intention of the parties to deal with property situated within its jurisdiction. (*cf. Narasimha Row v. Papamma* ².) In this view, the observations on this point in *Kunhi Sankaran v. Narayanan* ³ must be taken with some caution, for it is difficult to understand how the mere fact of a conclusion that even in respect of the additional item of property (which was subsequently interpolated in the deed) the document was properly executed and attested would dispense with the consideration of the question of proper registration, when the courts below had found that the object of including this item in the document was not so much to give an additional security to the mortgagee as to enable the mortgagor to get it registered near the place where he was living'.

1. (1918) 35 M. L. J. 641.

2. (1919) I. L. R. 43 M. 436.

3. (1919) I. L. R. 43 M. 405.

RAJANI KANTA DAS v. PURNA CHANDRA KUNDU : I. L. R. 48 C. 298.

We quite agree that a Small Cause Court's decree is no more sacrosanct than that of any other court in the matter of liability to be attacked on the ground of fraud. But we are not sure that the decision is beyond question, in so far as it holds that a decree passed by a competent court is liable to be set aside if in a subsequent suit for that purpose it is shown that the original claim was false to the knowledge of the party who put it forward. This is of course supported by the observations in *Manindra Nath v. Hari Mandal* ¹ but the wide recognition of a right of suit to impeach a decree for fraud (Cf. *Lakshmi Charan v. Nur Ali* ²) has not met with general approval. See the observations of Sadasiva Ayyar, J. in his order of reference in *Kadirvelu v. Kuppusami* ³ and the cases there cited. The Madras Full Bench evidently preferred to follow the observations of James and Thesiger L.J. J. in *Flower v. Lloyd* ⁴ rather than adopt the wider view taken in some of the later English decisions. As pointed out in *Kripasindhu Panigrahi v. Nanducharan* ⁵, a false allegation in the plaint stands on no different footing from perjured evidence because both alike must be deemed to have been considered and adjudicated on by the Court in the previous suit. In *Gunjeshwar Kunwar v. Durga Prasad* ⁶ the Judicial Committee no doubt make a point of the fact that the plaintiff in the earlier suit could have had 'no honest and bona fide belief in the claim which he was making,' but they were there dealing with a compromise entered into on behalf of a minor and the question was whether there was a *bona fide* claim to compromise.

RAJA ANAND RAO v. RAMDAS DADURAM : I. L. R. 48 C. 493 (P. C.)

This decision lays down that a suit under S. 92, C. P. C., does not necessarily abate either on the death of the defendant trustee or on the death of one of the plaintiffs. On the first point this is in accordance with the view taken by the Madras High Court in *Svaynana Desika v. Advocate-General* ⁷. With

1. (1919) 24 C. W. N. 133.

2. (1911) I. L. R. 38 C. 936.

3. (1918) I. L. R. 41 M. 743.

4. (1879) L. R. 10 Ch. D. 327.

5. (1919) 56 I. C. 606.

6. (1917) I. L. R. 45 C. 17.

7. (1914) 28 M. L. J. 174

reference to, the constitution of the suit as regards 'plaintiffs,' there is some diversity of opinion amongst Indian decisions. In *Chabile Ram v. Durga Prasad* ¹ it was no doubt recognised that a proceeding under S. 92 was one instituted by the plaintiffs in a representative capacity as members of the public, but the learned judges held that 'for the continuance of the suit it is necessary that there should be at least two plaintiffs' having the requisite sanction and that where only one of the original plaintiffs survived, the proceeding can be continued only on another member of the public coming forward to join in the suit and that he should also obtain the necessary sanction under S. 92. In *Parameswaran v. Narayanan* ² the Madras High Court dissented from the Allahabad decision in so far as it held that a suit under S. 92 abated on the death of one of the two original plaintiffs and that a fresh consent was necessary before any other member of the public could be added as a party. It is however not clear whether the learned judges were prepared even to hold that once the suit had been properly 'instituted' by two persons the subsequent death of one of them was immaterial in the sense that the suit could be continued by the surviving plaintiff alone. The present decision of Their Lordships throws no light on this question, for it would appear from the report of the case in the 25 C. W. N. 794. that there were four surviving plaintiffs.

BHEEMA DEO v. BEHARI DEO : I. L. R. 44 M 733 P. C.

This is an appeal from the judgment of the High Court of Madras reported in (1919) M. W. N. 52. The decision of the Privy Council proceeds upon the very narrow ground that the document relied upon as conferring authority on the widow conferred a present authority to adopt and was in no sense a will, further provisions as to management of property &c. being only ancillary to the exercise of the power. Their Lordships do not even decide whether the authority to adopt if it was intended to be posthumous, required registration. The High Court held that a mere authority to adopt in a document which calls itself a will but does not make a posthumous disposition of property of the testator requires registration. A document conferring power to adopt on the

1. (1915) I. L. R. 37 A. 296

2. (1916) I. L. R. 40 M. 110.

widow after his death would not, according to them, be a will unless it is coupled with a disposition of the property, no matter whether it is by way of trust or is even a disposition in favor of a person as an executor. As we have said, their Lordships express no opinion on this question. Nor do they express an opinion on the other interesting questions that arose in this case as to whether the power of adoption conferred on the widow is affected by the fact that there has been a devolution of the joint family property on a collateral line in the meanwhile or the fact that the son has lived up to the age of majority.

THIRUVENKATASAMI IYENGAR *v.* PAVADAI PILLAI : I. L. R. 44 M. 736 P. C.

This case turned on the construction of S. 36, C. P. C. of 1882 which corresponds to O. 3, R. 1 of the present Code of Civil Procedure. The question was whether a pleader appointed by an agent duly authorised in that behalf but not a recognised agent within the meaning of the rule could present an application for execution. Their Lordships hold he could. The judgment of the High Court proceeded upon a clear misreading of the section. The reason given by the High Court was that under S. 36, the pleader could do only what might be done by the party on whose behalf he is appointed. But a pleader is appointed by the agent to act for the principal and not for himself and the act of appointment of the pleader is obviously not "an appearance application or act in or to any court, required or authorised to be made or done by a party in such court"

PALANIAPPA CHETTIAR *v.* ALAGAN CHETTI : I. L. R. 44 M. 740 P. C.

In this case, the Privy Council hold against the opinion of the High Court that the custom of Patnibhaga or division between the children of a man according to mothers as distinguished from putrabhaga or division per capita which is the ordinary rule is established among the caste of Athangudi Chetties resident in the village of Vallalpatti. On account of the reference to the existence of such a custom in early writers, especially among the lower classes, their Lordships approached the question in what may be called an indulgent mood and found the evidence sufficient.

Another custom also is found by their Lordships to be proved (the High Court also found it proved) and that is the custom of Mooppu or the right of a woman to have some property allotted to her for maintenance when the husband takes another wife which is to go to her son on her death. Mooppu corresponds to the species of stridhana known as *Adhivedanika* which a husband is expected to give to a superseded wife as a solatium.

VEDACHALA MUDALIAR v. SUBRAHMANYA MUDALIAR :
I. L. R. 44 M. 753 P. C.

Barring the question of stridhana succession, no part of the Hindu law is so obscure as the rule of Bandhu succession, and it can by no means be said that the latest decision of the Privy Council has made the matter any clearer. On the other hand the Madras High Court had brought a certain amount of order where there was only chaos while the latest decision of the Privy Council taken with the two earlier ones has left us with a number of delightful generalities which when a practical application is sought to be made of them will be found in the highest degree elusive. It is however worthwhile to focus the rules laid down by the Privy Council in the three latest cases which must in future form the guide. In *Ramachandra Martand Waikar v. Vinayak Venkatesh Kothekar* ¹ two principles are laid down

(i) Heritable relationship among bhinna gotra sapindas is confined to 5 degrees from the common ancestor.

(ii) In order to be entitled to succeed, each *i. e.*, the propositus and the claimant should be the Sapinda of the other.

A doubt is thrown as to whether the classes referred to in Vriddasatapa's text could be added to though the enumeration of the members of each class may be illustrative and not exhaustive. Their Lordships do not elaborate as to what is meant by the classes referred to in Vriddasatapa's text nor was it necessary for the case. The absence of any disapproval of *Umaid Bahudur v. Udai Chand* ² in this case has led a Bench of the Madras High Court to hold that their Lordships approve of the rule assumed in that case *viz.*, that the propositus should be a descendant of the line of the maternal grandfather either of

1. (1914) I L. R. 42 Cal. 384.

2. (1890) I. L. R. 6 C. 119.

NOTES OF RECENT CASES.

Spencer and Ramesam, JJ. } S. A. No. 1612 of 1919.
1921, July 27.

Malabar Law—Sale of tarwad property by karnavan—Major portion of the consideration binding—Alienation good.

Where the karnavan of a Malabar tarwad sells tarwad property and it is found that the major portion of the consideration went towards tarwad necessities, the alienation ought to be upheld and the alienee need not be directed to pay the non-binding portion of the consideration, if as a matter of fact he had paid the whole consideration into the hands of the karnavan at the time of the sale.

C. V. Ananthakrishna Iyer for appellant.

K. P. M. Menon for respondent.

Krishnan, J. } C. R. P. No. 371 and 372 of 1920.
1921, August, 1.

Jurisdiction—Small cause court—Suit for breach of covenant for title—Provincial small cause courts Act, S. 23—Revision.

A suit for damages for breach of covenant for title on a sale of land is a suit of a small cause nature. If a court returns the plaint in such a case to the original side for trial under S. 23 of the Prov. Sm. C. C. Act the order is open to revision by the High Court under S. 25 of the Act.

V. C. Veeraraghavan for K. Bhashyam for petitioner.

K. S. Champakesa Iyengar for K. S. Krishnaswami Iyengar for respondent.

The Offg., C. J. and Krishnaswami Rao, J. } C. R. P. No. 426 of 1919.
1921, August 2.

Madras Estates Land Act, S. 3 (5)—Laud-holder—Minor inamdar in a Zemindari—Ejection of tenant—Civil or Revenue Court.

A minor inamdar holding under a post settlement grant from a Zemindar is a "land-holder" within the meaning of S. 3 (5) of the Estates Land Act.

Opinion of the majority in (1921) M. W. N. 413 followed.

C. Rama Row for petitioner.

The Offg., C. J. and
Krishnaswami Rao, JJ. } C. M. A. No. 282 of 1920.
1921, August 2.

Civil Procedure Code O. 40 Rr. 1, 3 and 4 Order directing receiver to render accounts and pay into court the moneys—
Appeal.

An order of court directing a Receiver to submit accounts and to pay the money in his hands into court is not appealable. It however the court enforces the order by attachment under O. 40, R. 4 C. P. Code then there is an appeal under O. 43, R. 1 (s) of the C. P. Code.

C. S. Venkatachariar for appellant.

K. S. Jayarama Iyer for respondent.

*Krishnan and
Odgers, JJ.* } S. A. No. 999 of 1920.
1921, August, 19.

Madras Estates Land Act, S. 13—Contract between landlord and tenant for higher rate of rent—Improvements by tenants after the Act—Effect.

Where before the Estates Land Act a lawful contract was made between the landholder and the ryot for payment of wet rates for wet crops grown with the aid of the tenants' improvements, but the improvements were effected by the ryot only after the passing of the Estates Land Act.

Held, per Krishnan, J.—That the case fell within S. 13 (3) of the Madras Estates Land Act and that the landholder was not entitled to claim wet rates.

39 Mad. 84 distinguished.

Per Odgers, J.—The contract being prior to the Estates Land Act, was valid and enforceable and the landlord was entitled to claim the wet rates.

39 Mad. 84 Relied on.

C. V. Anantakrishna Iyer for appellant.

S. T. Srinivasagopalachari for respondent.

*Krishnan and
Odgers, JJ.* } S. A. Nos. 1464 and 1465 of 1920.
1921, August, 19.

Contract—Consideration—Debt due by Manager of a joint Hindu Family becoming barred—Execution of promissory note by junior member in respect thereof—Liability.

Where a debt due by the manager of a joint Hindu family became barred and a junior member of the family executed a promissory note in lieu of the debt after it was so barred. *Held* Per *Krishnan, J.* (*Odgers, J.* dissenting) that there was consideration for the promissory note under S. 25 of the Contract Act and that the executant was liable.

[Owing to the difference of opinion between the members of the Bench the case was referred to a third Judge under S. 98, C. P. Code].

C. V. Ananthakrishna Iyer for appellant.

T. R. Venkatarama Sastri and C. V. Mahadeva Iyer for respondents.

*The Offg. Chief Justice
and Odgers, J.* } C. M. A. No. 325 of 1920.
1921, August, 29.

Provincial Insolvency Act (III of 1907) S. 37—Fraudulent preference—Avoidance—Pressure—Meaning of.

Where a transfer by an insolvent in favour of a particular creditor is impeached as a fraudulent preference the transferee does not discharge the burden of proof merely by letting in vague or general evidence of pressure on the debtor. He must prove the existence of pressure from this or that particular creditor and must offer evidence of the specific acts or threatened legal proceedings relied on as constituting pressure.

K. P. M. Menon for appellant.

B. Jagannatha Doss for respondent.

*Oldfield and
Ramesam, JJ.* } A. S. No. 377 of 1919.
1921, August, 31.

Execution sale—Mortgage decree—Order absolute—Death of puisne mortgagee—Legal representatives not brought on record—Execution sale—Legality of.

In a suit for sale by a prior mortgagee the puisne mortgagee was impleaded as a party and an order absolute for sale was eventually obtained after due notice to all the parties. Subsequent to the order absolute, the puisne mortgagee died but the properties were sold without his legal representatives being brought on the record. *Held*, that the execution sale was void and did not require to be set aside by the representatives of the puisne mortgagee.

25 Bom. 337 (P. C.) 32 Cal. 296 (P. C.) 31 All. 57 (P. C.) Referred to.

T. Rangachariar and K. Bhashyam Iyengar for appellant.

T. Narasimha Iyengar and A. Ganesa Iyer for respondent.

Odgers, J. } Crl. Rev. Case No. 339 of 1921.
1921, August, 31.

Criminal Procedure Code, Ss. 245, 253, 350, 435, 436—Charge framed—Trial by successor—Acquittal.

Five accuseds were charged with rioting and assault and the Magistrate after inquiry framed a charge against them under

Ss. 147 and 324, I. P. C. He was transferred and succeeded by another Magistrate who granted a *de novo* trial under S. 350, Cr. P. Code, and discharged the accused. The District Magistrate set aside the order of discharge and directed further inquiry. *Held*, that the order of discharge was in effect an acquittal and the District Magistrate had no jurisdiction to interfere with it. 38 M. 585 Rel. on.

R. Kesava Iyengar for petitioner.

V. L. Ethiraj for Public Prosecutor for the Crown.

<i>Oldfield and Ramesam, JJ.</i> 1921, September 1.	}	A. S. No. 145 of 1917.
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Civil Procedure Code, O. 21, Rr. 58, 63—Claim by mortgagee—Attachment not effected—Rejection of claim—Suit on mortgage—Limitation—Limitation Act, Art. 11.

In execution of a money decree certain properties were ordered to be attached but no attachment was actually effected. A mortgagee of the properties put in a claim that the properties should be sold subject to the mortgage and the court passed an order purporting to dismiss the claim petition. The mortgagee brought a suit to establish his right as mortgagee but withdrew the suit with liberty to sue afresh finding there was no valid attachment of the property. The mortgagee then sued on the mortgage more than a year after the date of the order on the claim petition and the purchaser of the properties pleaded that the suit was barred by Art. 11 of the Lim. Act.

Held, that as the mortgagee had wrongly invoked the jurisdiction of the court and obtained an order adverse to him, he was bound by the order on the claim proceedings until it was set aside, and that the present suit was barred by limitation.

11 Bom. 153 ; 11 Bom. 160.

Ex parte Pratt L. R. 12 Q. B. D. 334 Relied on.

C. S. Venkatachariar and *V. K. Srinivasa Iyengar* for appellant.

T. Rangachariar and *E. Duraisami Iyer* for respondent.

The Officiating Chief Justice and Odgers, J. } S. A. No. 28 of 1921.
 1921, September, 1. }

Decree—Amendment—Lapse of time—Rights of third parties affected—Estoppel.

Between the dates of the preliminary and final decree in a mortgage suit, some of the mortgaged properties were sold to appellants by a person who was in his turn a vendee from the mortgagor. The preliminary decree provided for the drawing up of the "usual mortgage decree" but the final decree did not give interest at the contract rate till the date of realisation. An application to amend the final decree by awarding the contract was put in more than 6 years after the passing of the final decree and after the mortgagee decree-holder had twice applied for execution of the final decree as originally passed and had even realised a portion of the decree-amount by sale of some of the properties. The appellants objected to the amendment on the ground of estoppel and on the ground that an amendment should not be allowed to prejudice the rights of third parties. *Held*, that there was no estoppel by reason of the decree-holder having executed the unamended decree and that the doctrine that an amendment should not be allowed to prejudice the rights of innocent third parties, had no application to the case.

Halton v. Harris (1892) A. C. 547, 558 distinguished.

K. Bhashyam Iyengar for appellant.

P. S. Narayanaswami Iyer for respondent.

Krishnan, J. } C. R. P. No. 780 of 1920.
1921, August, 23.

Civil Procedure Code, O. 9, R. 13 proviso—Suit against several defendants claiming distinct reliefs—Suit by reversioner against alienees from widow—Possession of distinct items claimed against several defendants—All the defendants ex parte—Ex parte decree—Sufficient cause for non-appearance of some of the defendants—Whether decree against all the defendants can be set aside—Point common to all the defendants—Whether a ground for setting aside the ex parte decree against all the defendants.

Where a person claiming to be the reversioner sues to recover distinct items of properties against several defendants claiming under the widow and the defendants were *ex parte* and an *ex parte* decree was passed against them all, the decree can be set aside only in favour of such of the defendants as had sufficient cause for not appearing at the time of hearing and not against all the defendants.

The fact that there is a point common to all the defendants is no ground for setting aside the decree against all the defendants.

C. A. Seshagiri Sastri for petitioner.

V. C. Viraraghavan for K. Bashyam Aiyangar and T. K. Vijiaraghavalu Naidu for the respondent.

Krishnan, J. } CrI. Rev. Case No. 245 of 1921.
1921, September, 12.

Criminal Procedure Code, S. 482—Award of maintenance—Evidence—Rate of maintenance.

Where a Magistrate awarded maintenance to the complainant under S. 488 Cr. P. Code, without taking any evidence as to whether the accused really neglected or refused to maintain his wife and where the only material appearing on the record is a statement by the accused that he was willing to maintain his wife. *Held*, that an enquiry as to the neglect or refusal of the husband to maintain his wife should have been made and further evidence should have been taken as regards the expenses

of the accused and the wants of the complainant before determining the rate of maintenance.

Salem Ramaswami Iyer for petitioner.

N. Ramachandra Iyer for respondent.

*The Offg. Chief Justice
and Odgers, J.* } C. M. A. No. 177 of 1920.
1921, September, 14.

*Provincial Insolvency Act, Ss. 4 and 36 — Insolvency—
Adjudication of debtor—Voluntary transfer—Setting aside—
Procedure.*

In a petition by a creditor for adjudicating the debtor insolvent, the act of insolvency relied on was a voluntary transfer of his property by the debtor. The court added the alienee as a party to the proceedings and after inquiry made an order adjudicating the debtor insolvent and setting aside the transfer. *Held*, that the procedure of the court below was irregular. It was only after the order of adjudication was made that the question of avoiding the transfer would arise and the transfer could be avoided only at the instance of the Official Receiver.

V. Ramadoss for appellant.

N. Rama Row for respondent.

*The Offg. Chief Justice
and Odgers, J.* } C. M. S. A. No. 184 of 1920.
1921, September, 14.

*Execution—Mortgage decree—Refusal to deliver title deeds—
Damages.*

A mortgagor obtained the usual decree for redemption. The decree did not specify what documents of title should be returned by the mortgagee to the mortgagor nor did it provide for any damages to be paid in case of default in returning the documents. In execution of the decree the mortgagor applied for damages being awarded against the mortgagee for failure to return the title-deeds. *Held*, that the question of damages could not be determined in execution but should have been provided for in the final decree.

E. Sankaran Unni for appellant.

C. V. Ananthakrishna Iyer for respondent.

*Phillips and
Krishnan, JJ.* } C. M. P. No. 2031 of 1921.
 1921, September, 15.

Civil Procedure Code, O. 45, R. 13—Stay of further proceedings—Appeal to the Privy Council—Power of High Court.

If in a suit for partition the High Court on appeal remands the case to the lower court for passing a preliminary decree and an appeal is preferred to the Privy Council against the order of the High Court it is not competent to the High Court to stay further proceedings in the suit pending the decision of the Privy Council.

42 A. 170 Referred to.

T. R. Ramachandra Iyer and N. A. Krishna Iyer for appellant.

C. V. Ananthakrishna Iyer for respondent.

*The Offg. Chief Justice
Kumaraswami Sastri
and Odgers, JJ.* } C. R. P. No 517 of 1920.
 1921, September,

Madras Survey and Boundaries Act (IV of 1897) S. 20—Tenant—Rent free inamdar—Liability to pay cost of survey.

A rent-free inamdar in a zemindari is not a "tenant" within the meaning of S. 20 (3) of the Survey and Boundaries Act and he is not liable to contribute to the cost of the survey.

B. C. Seshachalla Iyer for *A. Krishnaswami Iyer* for petitioner.

T. M. Ramasami Iyer for *Ch. Raghava Rao* for respondent.

*The Offg. Chief Justice,
Kumaraswami Sastri
and Odgers, JJ.* } C. R. P. No. 1120 of 1919.
 1921, September, 19.

Railways Act, Ss. 77 and 140—Consignment of goods by railway—Negligence of railway servants—Damages—Notice of claim to whom to be given.

A notice of claim for loss of goods consigned by a Railway alleged to have been caused by the negligence of its servants must be given to the Agent of the Railway in the

absence of any rule or bye law to the effect that such claims might be sent to the District Traffic Superintendent.

N. A. Krishna Iyer for petitioner.

T. L. Venkatarama Iyer for *V. Visvanatha Sastri* for respondent.

Spencer and Kumaraswami Sastri, JJ.
1921, September, 19.

Cr. M. P. Nos. 409 to 411 of 1921.

Martial Law Ordinance II of 1921—Martial Law area—Arrest of person outside Martial Law area for an offence committed in the area by a Martial Law Magistrate—Legality of—Habeas corpus—Power of High Court to issue writ.

Per curiam: A person accused of an offence alleged to have been committed within the Martial Law area under the Martial Law Ordinance (II of 1921) can be legally arrested outside such area. The provisions of the Criminal Procedure Code are not totally abrogated or suspended by the introduction of Martial Law in a particular area. The High Court has power to issue a writ of Habeas corpus even outside the City of Madras.

6 Beng. L. R. 392 ; 36 M 72 followed.

Per Kumaraswami Sastri J.,: S. 16 of the Martial Law Ordinance (II of 1921) cannot apply to cases where the acts of the Martial Law Magistrate are wholly without jurisdiction, *e. g.*, where he tries persons or passes sentences in respect of offences outside the Martial Law. An arrest made outside the Martial Law area by a summary Magistrate appointed under the Martial Law, who is also a Sub-Divisional Magistrate of the place, is irregular but not without jurisdiction. When a Magistrate vested with more than one power under one of which only he has authority to order a remand, purports to act in the exercise of another power which gives him no authority to do so, the case is one of irregularity which can be cured by amendment of the order especially where there is no prejudice to the accused.

S. Srinivasa Iyengar and *P. Govinda Menon* for petitioner.
Public Prosecutor (J. C. Adam) for the Crown.

Spencer and Ramesam, JJ. } A. S. Nos. 193 and 202 of 1920.
1921, October, 3.

Inam—Service inam lands—Partition—Convenience.

Where lands are held as a service inam in respect of an office in a mosque it is open to the office-holders to partition the lands among themselves for the purpose of convenient enjoyment during their life-time.

V. S. Narasimhachar for P. Venkataramana Row for appellant.

T. R. Ramachandra Iyer and N. R. Sesa Iyer for respondent.

Kumaraswami Sastri, J. } C. R. P. No. 751 of 1920.
1921, October, 7.

Principal and agent—Authority ambiguous—Construction—bona fide contract by agent—Binding on principal.

Where the instructions given to an agent are ambiguous and are capable of more than one construction, every act done by him in good faith which is warranted by any one of those constructions is deemed to have been duly authorised though the construction adopted and acted upon was not the one intended by the principal.

Ireland v. Lurington L. R. 5 H. L. 395 followed.

C. A. Seshagiri Sastri for appellant.

A. V. Visvanatha Sastri for respondent.

Oldfield and Krishnan, JJ. } C. R. C. No. 138 of 1921.
1921, October, 7.

Railways Act, Ss. 42 and 109—Reservation of compartment for Anglo-Indians and Eurasians—Reservation rules—Requisition by stationmaster.

The accused entered a railway compartment represented by the Stationmaster to have been reserved for Anglo-Indians but to which no reservation card signed by the Stationmaster as required by Rule 172-A of the Traffic Working Orders had been affixed. *Held Per Krishnan, J.,*

vation of the compartment, that the mere representation of the Stationmaster that it was reserved did not constitute notice to the public and that the accused had committed no offence under S. 109 of the Railways Act.

Per Oldfield, J. Even if the required reservation card signed by the Stationmaster was not labelled on the compartment, the requisition of the Stationmaster was clear notice to the accused of the fact of reservation and the accused committed an offence under S. 109 of the Railways Act in entering the compartment. The Railway Company as owners of the rolling stock and other property had wide powers in the matter of arranging for the convenience and accommodation of the traffic. The Railway could validly reserve a compartment for the convenience of individual passengers or a class of passengers and a reservation in favour of Anglo Indians did not amount to undue preference under S. 42 (2) of the Railways Act.

S. Srinivasa Iyengar and A. C. Sampath Iyengar for petitioner.

Public Prosecutor for the Crown.

Oldfield and
Krishnan, JJ. } Cr. M. P. No. 138 of 1921.
2021, October, 7.

Criminal Procedure Code, Ss. 213 and 215—Commitment to Sessions—Power of High Court to quash commitment.

On a charge of dacoity under S. 395 I., P. C., the accused set up the plea of a *bona fide* claim of right and the Sessions Judge referred the case to the High Court to quash the commitment on the ground that "dishonest" intention was absent. The High Court held that the question of dishonest intention was a mixed question of law and fact to be decided on a balancing of the relevant considerations and evidence as a whole, and the High Court could not quash the commitment at that stage.

2 Weir 202 distinguished.

Public Prosecutor for the Crown.

Messrs. C. Narasimhachariar and T. K. Srinivasathathachariar for the accused.

Kumaraswami Sastri, J. } C. R. P. No. 171 of 1921.
1921, October, 13.

Civil Procedure Code, O. 6, R. 17—Legal representative—Amendment of plaint—Practice.

Where a plaintiff dies pending a suit and his legal representative comes on record it is not open to him to amend the plaint by introducing a cause of action personal to himself and which he might make the ground for an independent suit of his own.

A. Krishnaswami Iyer and *B. C. Seshachalla Iyer* for petitioner.

L. A. Govindaraghava Iyer and *A. Ramachandra Iyer* for respondent.

Kumaraswami Sastri, J. } S. A. No. 1464 of 1920.
1921, October, 13.

Contract Act, S. 25—Contract—Consideration—Debt due by manager of a joint Hindu family becoming barred—Execution of promissory note by junior member in respect thereof—Liability.

Per *Kumaraswami Sastri J.* (agreeing with *Krishnan, J.*) and dissenting from *Idgers, J.* :

Where a debt due by the manager of a joint Hindu family became barred and a junior member of the family executed a promissory note in lieu of the debt after it was so barred, *Held* there was consideration for the promissory note and the executant was a "debtor" within the meaning of S. 25 of the Contract Act.

C. V. Ananthakrishna Iyer for appellant.

T. R. Venkatarama Sastri and *C. V. Mahadeva Iyer* for respondents.

Spencer and Ramesam, JJ. } O. S. A. 23 of 1921.
1921, October, 19.

Hindu Law—Succession—Bhandus.

A step-sister's step-son is not a heritable *bhandhu* under the Hindu law. Texts and cases reviewed.

A. Krishnaswami Iyer for appellant.

T. R. Venkatarama Sastri and *A. Narasimhachari* for respondents.

Spencer and
Ramesam, JJ. } A. S. No. 149 of 1920.
1921, October, 21.

Hindu Law—Adoption—Co-widows—Junior widow adopting without consent of senior—Senior widow living apart during husband's life-time—Effect of—Consent of sapindas—Requisites of.

An adoption by a junior widow with the consent of the sapindas but without properly asking for the consent of the senior widow is invalid. The senior widow has the preferential right to adopt to her husband. 39 Mad. 772 ; 2 M. L. J. 72 followed.

The senior widow does not lose her preferential right to make an adoption merely because she had been living away from her husband for a long period during his life-time and until his death ; where no adultery or other misconduct is proved, mere residence apart from her husband does not affect her right.

A junior widow, before she can make a valid adoption must ask the senior widow to make the adoption herself and if she is unwilling to do so, then, to agree to an adoption by the junior widow. A notice sent by the junior widow to the senior stating that the adoption made by their husband should be confirmed and asking for a statement of the views of the senior widow is not a sufficient compliance with the requirements of the law,

Per Ramesam, J. The principle of Hindu law that of two widows, the senior has the preferential right to adopt applies to Sudras as well. In their case though Datta Homam is not essential for the validity of an adoption, adoption is none the less a religious act.

A consent given by a sapinda to an adoption by the widow, on the erroneous representation that the act was in accordance with the wishes of her deceased husband, is ineffectual.

A prohibition to adopt must be either express or must be inferred from equally clear evidence of intention on the part of the husband that his widow should not adopt to him. 23 Bom. 789 foll. (1894) B. P. J. 191 distinguished.

T. Rangachariar and S. Panchapagesa Sastri for appellant.

A. Krishnaswami Iyer and K. Balasubramania Iyer for respondent.

The Officiating Chief Justice and Odgers, J. } C. M. A. No. 310 to 312 of 1919.
1921, October, 19.

Evidence Act, S. 90—Copies of documents—Presumption as to genuineness—Inam—Grant—Presumption.

The presumption under S. 90 of the Evidence Act applies to copies of documents proved to have been prepared from the original. The presumption laid down by the cases in 40 M. 1012 P. C. and 43 Mad. 166 P. C. has no application to cases where the original inam grant itself is forthcoming. In such cases the Court has only to construe the grant according to its terms and the subsequent conduct of the parties is irrelevant.

P. Narayanamurti and K. Ramamurti for appellant.

V. Ramadoss and C. H. Raghava Row for respondent.

Spencer and Ramesam, JJ. } O. S. A. No. 97 of 1920.
1921, October, 19.

Insolvency—Suit by Official Receiver—Leave to sue—Want of—Objection by parties.

An objection to a suit instituted by an Official Receiver on the ground that leave of the court has not been granted for its institution is not fatal to the suit. Such an objection is one primarily for the court and not for the parties.

T. V. Gopalasami Mudaliar for appellant.

O. T. Govindan Nambiar for respondent.

The Officiating Chief Justice and Odgers, J. } O. S. A. No. 81 of 1921.
1921, October, 24.

Presidency Towns Insolvency Act (III of 1909) Ss. 52, (2) and 57—"Order and disposition"—Pledge of goods by insolvent—Equity of redemption in goods—Avoidance of transfer—Bona fides, if essential under S. 57.

The owner of certain goods pledged them with A and subsequently gave a letter of hypothecation of the same goods to B who was already his creditor. Subsequently the owner was adjudicated insolvent on his own petition. *Held* that the

goods were not in the order or disposition of the insolvent within the meaning of S. 52 of the Presidency Towns Insolvency Act.

Greening v. Clark 4 B. & C. 316. *Webb v. Whinney* 18 L. T. 523 Relied on.

An equity of redemption in goods is not "goods" within the meaning of S. 52 of the Act.

Colonial Bank v. Whinney 30 Ch. D. 261 (Q. A.) 11 A. C. 426 followed.

The doctrine of relation back of the trustee's title to the act of bankruptcy will not prevail against any security taken by a creditor for his antecedent debt at a time when no insolvency petition had been presented. Bona fides is not necessary to enable a transferee to seek the protection given by S. 57 of the Pres. T. Insol. Act. 39 Mad. 250-doubted.

Hon' The Advocate General and O. T. Govindan Nambiar for appellant.

A. Krishnaswami Iyer M. Subbaraya Iyer and N. Sivarāma-krishna Iyer for respondent.

The Officiating Chief
Justice and Odgers, J.
1921, October, 25.

C. M. A. No. 44 of 1921.

*Estoppel—Statement in sale proclamation—Execution sale
Setting aside—Decree holder selling his own property by mistake
as that of his judgment-debtor—Confirmation of sale—Effect of.*

In execution of a money decree the decree holder brought his own properties to sale by mistake, as those of his judgment debtor. The properties were sold in execution, purchased by a stranger and the sale was confirmed in due course. On an application by the decree-holder to set aside the sale. *Held* (1) that the decree-holder was estopped from setting up his own title to the property in the face of the representation in the sale proclamation, and (2) that in any event, the decree-holder could not apply to set aside the sale, after its confirmation.

S. Panchapagesa Sastri for appellant.

K. S. Ganapathi Iyer for respondent.

Oldfield and Krishnan, JJ. } A. S. No. 374 of 1919.
1921 November, 3. }

Interest—Damages—Money had and received.

In an action for money had and received by defendant to the plaintiff's use, it is open to the court to award interest by way of damages.

K. V. Krishnaswami Iyer for appellant.

A. Krishnaswami Iyer and *K. Balasubramania Iyer* for respondent.

Officiating Chief Justice }
and Odgers, J. } S. A. No. 1492 of 1920.
1921 November, 8. }

Foreign judgment—Submission to jurisdiction—Submission by agent—Cause of action.

In a suit in a British Indian Court on a foreign judgment objection was taken by the second defendant that that court had no jurisdiction to try the case and therefore the judgment was not enforceable in British India. It was found that the second defendant had given a power of attorney to the first defendant authorising him *inter alia* to institute and defend suits in the foreign court and the first defendant had accordingly instituted and several suits on behalf of the second defendant in that court.

Held there was an implied submission to the jurisdiction of the foreign court by the second defendant both on the ground that there was a choice of that forum by him through the first defendant and on the ground that the powers granted to the first defendant under the power of attorney amounted to a representation to strangers that the second defendant would submit to that jurisdiction.

Ramanatha Chettiar v. Kalimathu Pillai 37 Mad. 163
Relied on.

To constitute a submission to the jurisdiction of the foreign court it is not necessary that the defendant should have been resident within its territorial jurisdiction at the time of action.

K. Krishnamachariar and *N. R. Govindachariar* for appellant.

K. Bhashyam and *K. Narasimha Iyengar* for respondent.

Officiating Chief Justice }
and Odgers, J. } S. A. No. 1563 of 1920.
 1921 November, 11. }

Madras Estates Land Act Ss. 112 and 189—Rent sale—Suit for ejectment in civil court—Plea that sale is vitiated by fraud if open.

In a suit for ejectment in a civil court by the purchaser of a holding at a sale in execution of a decree for arrears of rent, treating the defendant as a trespasser, it is not open to the latter to resist the suit on the ground that the rent sale in favour of the plaintiff was voidable on account of fraud. The defendant should have set aside the sale by taking the appropriate proceedings in the Revenue Court and having omitted to do so, could not set up the voidable character of the sale in defence in the civil court.

Lakshmidoss v. Roop Laul (1906) 30 M. 169 distinguished.

K. Rajah Iyer for appellant.

K. S. Ganapathi Iyer for respondent.

The Officiating Chief Justice and Odgers, J. } C. M. A. No. 109 of 1921.
1921, November 16.

Mortgage—Preliminary decree—Final decree—Preliminary decree under S. 88 of the T. P. Act—Appeal after new C. P. C., 1908—Application for final decree—Limitation Act, Art. 181.

Where a preliminary decree for sale in a mortgage suit was passed under S. 88 of the Transfer of Property Act and that decree was modified on appeal after the new C. P. Code 1908 came into force, *Held*, (1) that a final decree had to be passed under O. 34, R. 5 of the C. P. Code and (2) that the application thereof had to be made within the period of 3 years after the date of the decree on appeal.

13 L. W. 37 ; 46 C. 670 distinguished,

44 M. 714 followed.

C V Ananthakrishna Iyer for appellant.

B. Sitarama Row and Chidambaram and Martandam for respondent.

Krishnan and Odgers, JJ. } S. A. No. 1465 of 1920.
1921, November, 15.

Limitation Act S. 10—Trust—Express trust—Conveyance in favour of defendant—Consideration furnished by plaintiff—Suit for accounts—Limitation.

Where properties are conveyed to defendants but the consideration for the sale is paid out of the plaintiff's moneys in their hands, there is no express trust but only an implied trust in favour of the plaintiff under S. 82 of the Trusts Act. Consequently a suit by the plaintiff against defendants for possession of the properties and for accounts, is not governed by S. 10 of the Limitation Act.

C. V. Ananthakrishna Iyer for appellant.

T. R. Venkatarama Sastri for respondent.

Spencer and Kumarama Sastri, JJ. } A. S. Nos. 284, 287 and 288 of 1920.
1921, November, 16.

Land Acquisition Act, Ss. 9, 10 and 25—Land Acquisition proceedings—Widow—Reversioner—Right to intervene.

Notice under S. 9 of the Land Acquisition Act was served only on the widow in possession of an estate compulsorily

acquired by the Government. The reversioners were not served with notice of the proceedings. The Collector made an award at a rate lower than that claimed by the widow but the widow accepted the award and kept quiet. The reversioners made an application for a reference to court under S. 18 of the Act claiming a larger amount. The Court below while holding that the collector's award was below the market value of the property acquired by Government, held that the widow as well as the reversioners were bound by the claim made before the collector by the widow under S. 25 of the Act. *Held* on appeal that the reversioners had a right to intervene in the proceedings and to claim a reference to court, that they were not bound by the claim made by the widow and that they were entitled to have the market value of the property properly ascertained before applying for investment.

V. Visvanatha Sastry for appellant.

Government Pleader for respondent.

*The Offg. Chief Justice
and Justice Odgers.*
1921, October, 14.

C. M. A. No. 89 of 1921.

C. P. C., S. 47, Cl. 2.—Conversion of suit into an Execution application—Subject to any question of limitation—Whether the Court is bound to decide the question of limitation first before entertaining the suit as a proceeding in execution under S. 47 (2).

Where a suit for an injunction restraining the defendant from executing a money-decree against the plaintiff on the ground of an agreement entered into between the parties before decree was held by the first court to be barred under S. 47, C. P. C. and the lower appellate court while agreeing with the trial court that the suit was barred remanded the case with a direction to treat it as an execution proceeding under S. 47 (2).

Held, on appeal from the order of remand, that the lower appellate court was not bound to decide the question of limitation before having the suit treated as an Execution application and that the question of limitation might be left to be decided by the executing court.

K. R. Narayanaswami Aiyar and *S. Rangaswami Aiyangar* for appellant.

S. Ganapatisundaram Aiyar for *N. Swaminatha Aiyar* for respondent.

*The Chief Justice
and Odgers, J.* } O. S. A. No. 61 of 1921.
1921, November, 23.

Presidency Towns Insolvency Act, S. 7—Powers of Insolvency Court—Decision on questions affecting title of the insolvent to properties—Adjudication on claims by strangers.

A Hindu father conveyed ancestral property for alleged necessity and for discharging antecedent debts, agreeing at the same time, to indemnify the purchaser against any possible loss that might arise in case the vendor's sons, who were minors, succeeded in getting the sale set aside. The indemnity was secured on the remaining properties of the vendor. The vendor eventually became an insolvent and his properties vested in the Official Assignee who applied to the Court for a direction to sell the properties of the insolvent free of the claim under the indemnity. The purchaser as well as the minor sons of the vendor were made parties to the application. *Held*, confirming the Judgment of Coutts Trotter, J. (1) that the Insolvency Court had power under S. 7 of the Pres. Towns Ins. Act to adjudicate on the validity of the sale so as to bind the purchaser and the minor sons of the vendor (insolvent); (2) that the sale was binding on the sons of the vendor, having been effected for purposes binding on the family; and (3) that the properties of the insolvent should be directed to be sold free from any liability under the indemnity deed.

K. V. Krishnaswami Iyer for appellant.

H. D. Cornish & S. G. Sadagopa Mudaliar for respondent.

*Kumaraswami Sastri
and Devadoss, JJ.* } S. A. No. 586 of 1920.
1921, November, 24.

Hindu Law—Widow—Surrender—Grant of absolute right in a portion of the estate for maintenance.

Where a Hindu Widow surrenders her estate in favour of the next reversioner in consideration of her being given an absolute estate in a portion of the lands surrendered, as a provision for her maintenance, the surrender is valid under the Hindu Law.

A. Krishnaswami Iyer and *K. Balasubramania Iyer* for appellant.

A. Visvanatha Iyer for respondent.

*Spencer and Kumara-
swami Sastri, JJ.* } A. S. No. 13 of 1921.
1921, November, 23.

*Adverse Possession—Co-owners—Portion of the property in
the occupation of co-owner—No bar of limitation.*

If a tenant-in-common is in possession of a portion of the properties held in common by himself and his co-tenants, there is no bar of limitation, for a suit by him for recovery of his share of the properties in the possession of the other co-tenants.

B. Sitarama Row and K. Srinivasa Row for appellants.

A. Krishnaswami Iyer for respondents.

*Spencer and Kumara-
swami Sastri, JJ.* } A. S. No. 254 of 1920.
1921, November, 30.

*Hindu Law—Joint family—Debts—Trade—Illegal trade—
Liability of other members.*

It is not competent to a member of a Joint Hindu family to embark on a new trade so as to bind the other members of the family or their share of the family property. Where a member of a Joint Hindu family enters on a trade prohibited by law, e. g., in contravention of the terms of an opium licence, there is no presumption that the trade is a family trade and the other members of the family would not be liable.

T. Rangachariar and P. Somasundaram for appellant.

S. Srinivasa Iyengar, D. Appa Row and C. Rama Row for respondents.

*Ayling and
Venkatasubba Row, JJ.* } C. M. A. No. 63 of 1921.
1921, December, 1.

Civil Procedure Code, S. 144—Execution sale—Decree modified on appeal and decree amount reduced—Effect on execution sale.

In execution of a decree for money, several items of property were sold and the decree was satisfied. Subsequently the decree was modified on appeal and the amount due thereunder was reduced by Rs. 200. It was found that the sale of all the items was necessary to realise the amount of the modified decree, though the sale fetched Rs. 200 more than was

necessary to satisfy the decree. On an application by the Judgment-debtor to set aside the execution sale, *Held*, that the execution sale could not be set aside and all that the Judgment-debtor was entitled to, was a refund of the sum of Rs. 200 realised in excess of the modified decree.

27 M. 98 Distinguished.

A. Krishnaswami Iyer and Ch. Raghava Row for appellant
C. Madhavan Nair for respondent.

*Ayling and
Venkatasubba Row, JJ.* }
1921, December, 6.

Civil Procedure Code, O. 22, Rr. 3 and 10—Mortgage—Preliminary and final decree—Death of plaintiff after preliminary decree—Abatement.

A mortgage suit continues as a pending suit after the preliminary decree is passed and till the passing of a final decree. Consequently where the plaintiff dies after the preliminary decree and his legal representative is not brought on record within the period of three months prescribed by law, the suit abates and must be dismissed. An application to continue the suit by a legatee of the deceased plaintiff does not fall within O. 22, R. 10 which applies only to cases other than those covered by O. 22, Rr. 1 to 9 of the C. P. Code and does not therefore cover a case of devolution on the death of the plaintiff.

C. Rama Row for appellant.

G. Lakshmanan for respondent.

*Ayling and
Odgers, JJ.* } S. A. No. 1077 of 1920.
1921, December, 7.

Hindu Law—Adoption—Orphan—Estoppel—Prescription.

The adoption of an orphan is invalid under the Hindu law and such an adoption cannot be validated by reference to the doctrine of estoppel. An estoppel cannot be founded on a representation as to a matter of law.

*Per Ayling, J. :—*It is not open to a person to acquire a title as an adopted son by prescription.

C. V. Ananthakrishna Iyer for appellant.

A. Krishnasami Iyer and B. C. Seshachalla Iyer for respondent.

Ayling and Venkata-
subba Rao, JJ. } C. M. A. No. 139 of 1920.
 1921, December, 7.

Limitation Act, S. 19—Acknowledgment—Prior statements in writing—Effect of.

An acknowledgment of execution is not an acknowledgment of liability subsisting at the date of acknowledgment. An acknowledgment that the liability existed at some particular time is not an acknowledgment for the purposes of S. 19 of the Limitation Act.

33 Cal. 1047 (P. C.) distinguished.

K. V. Sesha Aiyangar for appellant.

V. S. Vaz for respondent.

Ayling and Venkata-
subba Rao, JJ. } C. M. A. No. 295 of 1920.
 1921, December, 7.

Provincial Insolvency Act S. 56—Power of Insolvency Court to put purchaser from Official Receiver in possession.

Under the Provincial Insolvency Act (V of 1920) the Insolvency Court has power to inquire into the title of a person claiming adversely to the insolvent and if necessary to put the purchaser from the Official Receiver in possession of the properties purchased by him as against the adverse claimant.

A. Krishnaswami Iyer and *M. Subbaroya Iyer* for appellant.

K. V. Krishnaswami Iyer for respondent.

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JUDGES OF THE HIGH COURT.

1921,

July—December.

Chief Justice.

The Hon'ble Mr. Walter George Salis Schwabe, K. C. *Barrister-at-law*).
(from 23rd November 1921.)

" Sir William Bock Ayling, Kt., I. C. S. Officiating Chief Justice
(from 25th July to 22 November 1921).

Puisne Judges.

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" Mr. Charles Edwin Odgers, M.A., B. C. L. (*Barrister-at-law*).

" Mr. M. D. Devadoss (*Barrister-at-law*) (from 17th November
1921).

" Mr. M. Venkatasubba Rao, B.A., B.L., (from 17th November
1921).

" Rao Bahadur C. Krishnaswami Rao, B.A., B.L., (Officiating
from 25th July to 24th August 1921).

Advocate-General.

" Mr. C. P. Ramaswami Ayyar, B.A., B.L.

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[PART I.]

PRIVY COUNCIL.

PRESENT: LORD BUCKMASTER, LORD DUNEDIN, LORD SHAW AND SIR JOHN EDGE.

[On Appeal from the High Court of Judicature at Madras.]

Musti Venkata Jagannadha

... Appellant.*

v.

Musti Veerabhadrayya

... Respondent.

Land—Law of Madras—Service tenures—Karnam lands, nature of title thereto—Has the office-holder's family any rights in such lands—Enfranchisement of Inams under Inam Rules of 1859—Whether it enures for the benefit of an office-holder's family or to himself exclusively—Distinction between personal or subsistence grants and service Inams—Madras Acts 2 of 1894 and 3 of 1895—Madras Karnam Regulations of 1802, 1806 and 1831—Difference between the law of the Palayam and the law of the Karnam inams.

P. C.

Musti Venkata Jagannadha

Musti Veerabhadrayya.

The lands comprising the emoluments of a Karnam or village accountant in Madras are not joint family property. They are an appanage of the office, inalienable by the office-holder, and designed to be the emolument of the officer into whose hands soever the office may pass. In many cases there may be a long continuance of the office in a particular family, but there is no absolute right of hereditary succession: the Karnam is a personal appointee, and if a stranger is appointed the lands go with the appointment to the stranger selected, without being subject to any claims thereon as a family right by relatives of former holders of the office.

This was the law in Madras even before Madras Act 2 of 1894 and Madras Act 3 of 1895, which make it clear that eligibility for the appointment of Karnam is a matter personal to the appointee.

When Karnam lands are enfranchised under the Inam Rules of 1859 the enfranchisement is to the office-holder himself and does not enure for the benefit of his family.

In this respect Karnam lands, which are service Inams, differ from Palayam lands, which are now merely personal Inams. When a Palayam was abolished, in so far as the duty of rendering military service was concerned, the estate was continued with all its hereditary incidents to the Palayagar like an ordinary zemindari. But in the case of Karnams the lands follow the office.

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Venkata v Rama (1) approved.
Gunnayan v. Kamakoli Ayyar (2) and *Pingala Lakshmipathi v. Bommi-*
reddipalli Chalamayya (3) overruled.

Appeal from a decree of the Madras High Court (Ayling and Seshagiri Ayyar, JJ.) reversing a decree of the Temporary Subordinate Judge of Cocanada.

The facts are sufficiently stated in their Lordships' judgment. The trial Judge dismissed the suit : the High Court gave plaintiff a preliminary decree for his share. Hence this appeal.

Dunne K. C. (Narasimham with him) for appellant : The Government has power to appoint and dismiss Karnams, but they appoint from the family if possible. Here Government removed a father and appointed his eldest son, who sued for the lands in the Revenue Court under Madras Act 3 of 1895 and got a decree and possession in 1902. The present suit for partition was brought in 1916, and is barred, we submit, by limitation.

(*Sir John Edge* : Would not the decision in 1902 be res-judicata ?)

The suit was in a Revenue Court, dealing with the matter, it may be, on a special basis. They appealed up to the Board of Revenue, which dismissed the appeal in 1905. The point of res judicata has not been raised below, or we might succeed on it : till the lands were enfranchised in 1906 the Civil Court had no jurisdiction.

The High Court has reversed the trial Judge on the authority of an unreported case decided by themselves, Appeal No. 79 of 1917. The decision then was that a Service Inam and the emoluments thereof were joint family property, and that the coparcenary interest continued after enfranchisement.

(*Lord Dunedin* : The effect of enfranchisement was under determination in *Ramayya v. Jagannadham* ⁴. As long as the lands are attached to the office, they are necessarily impartible : but it may be contended the bar on partition is removed when they are enfranchised).

In many Madras cases previous to 1902 it had been laid down that in properties attached to an office nobody but the holder of the office himself had an interest. In *Srinivasayyar v. Lakshmanamma* ⁵, a dismissed Karnam sued to recover his lands

1. (1884) I. E. R. 8 Mad. 249 (F. B.)

2. (1902) I. L. R. 26 Mad. 339 ;

3. (1907) I. L. R. 30 Mad. 484 : (F B)

4. (1915) I. L. R. 39 Mad. 930 ;

5. (1883) I. L. R. 7 Mad. 206

which had been enfranchised to his successor, and it was held that the lands being attached to the office, the suit would not lie. *Bada v. Hussu Bhai* ¹ is to the same effect. In *Venkata v. Rama* ² a Full Bench held that a member of the old office holding family could not recover lands which had been enfranchised to a stranger appointee.

(*Lord Dunedin* : In that case there are two root ideas the view of Turner, C. J. that the lands were the emolument of the office and not joint family property : and the view of Hutchins, J. that subject only to a veto the office was hereditary. The question is whether the tenure is official or hereditary.)

The hereditary right to the office is irrelevant : the question is as to the property in the lands which go with the office. The only person who has any right to them is the holder of the office : in the case cited, if it had been coparcenary property, the plaintiff as adopted son would have had a share. What respondent has to establish here is coparcenary right, and that was negatived there. *Venkata v. Rama* ³ was followed in *Venkatarayadu v. Venkataramayya* ⁴, and *Dharani Pragada v. Kadambari* ⁵.

In *Gunnaiyan v. Kamakchi Ayyar* ⁶ however, Bhashyam Aiyangar, J. held that enfranchisement did not enure for the benefit of the enfranchisee only, as it was merely the recognition of an existing right. The decision itself is not against us, but the judgment is, in so far as it says that a service tenure is on the same footing as a personal one, and the learned Judge applies to the former the decision in *Narayana v. Chengalamma* ⁷. The latter case was one of an unsettled palayam and both parties treated it not as a service tenure at all but as an ancestral estate.

In *Pingala Lashmipathi v. Bommireddipalli Chalamayya* ⁸ a Full Bench applied this to Karnam lands, and held that enfranchisement did not confer on the persons named in the title deed any right in derogation of those possessed by others in the main at the time of enfranchisement. In that case the man claiming a share was in fact named in the inam deed.

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1. (1883) I. L. R 7 Mad. 236.

2. (1884) I. L. R. 8 Mad. 249.

3. (1884) I. L. R 8 Mad. 249.

4. (1891) I. L. R. 15 Mad. 249

5. (1897) I L. R. 21 Mad. 47.

6. (1902) I. L. R. 26 Mad. 339

7. (1886) I. L. R. 10 Mad. 1.

8. (1907) I. L. R. 30 Mad. 434.

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In *Ramayya v. Jagannadham*¹ it was held that the effect of enfranchisement was not to destroy the rights of any members of a joint family which had a hereditary interest in the inam. But the whole point is whether any members of the joint family have that hereditary right. These latter cases hypothesize that there are co-parcenary rights in property attached to the office of Karnam and it is just that which we deny.

There have been no Karnam cases before the Board, but the principle is the same as that of ghatwali estates, as to which it has been held they are not possessed by the family: the office is hereditary, but the title to the lands is not hereditary. *Durga Prasad Singh v. Tribeni Singh*.²

(Reference was also made to Madras Act 2 of 1894, Ss. 3, 9 (6), 16 (2), 17, 20, 28 and 29 : and to Madras Act 3 of 1895, Ss. 3, 7 (1), 13 and 21 : and to the Inam Rules contained in the Standing Orders of the Board of Revenue, 1907, p. 180).

Narasimham followed : Government has power to resume service inams, and can appoint any one it pleases : *Gunnaiyan v. Kamakchi Ayyar*,³

The recent decisions in Madras lay down that the joint family is entitled to a share : even if they are right, it must be the joint family at the date of enfranchisement : there was no joint family between the plaintiff and defendant's family in 1907.

De Gruyther K. C. (Dube with him) for respondent : The true position is that the lands of a Karnam are lands held by the family of the Karnam, subject to the burden of performing the duties : the next heir succeeds and the lands do not go out of the family, unless no single member of the family can perform the duties. The lands are not affected at all by the enfranchisement : the only thing affected is the inam-the revenue. Government never make any demand on the owner of the lands. After enfranchisement the position is as if there had never been any service.

In this case both sons had an existing interest in the land in the father's lifetime. The land was held by the elder brother as family property and I was entitled to partition.

1. (1915) I. L. R. 39 Mad. 980.

2. (1918) 45 I. A. 251, 256.

3. (1902) I. L. R. 26 Mad. 439, 448.

*Venkat v. Rama*¹ was different : the lands were held by an outsider, and it was held a member of the old family could not recover : it was not a case of coparcenary.

The position of Karnams is set out in the fifth Report to the House of Commons in 1812, Vol. II, (Madras) p. 11 et seq : which lays down that by custom the lands of a karnam are hereditary, and all members of the family participate in the benefit.

Madras Regulation 29 of 1802 was the first to deal with these Karnams. By Ss. 4 and 5 the heir is to be chosen except in case of incapacity. A competent heir had the right to claim, and there is no provision for dismissal except on the sentence of a Court. Regulation VI of 1831 declares the emoluments inalienable. Here you have joint family property, impartible because of a Regulation : probably partible before.

(*Lord Buckmaster*) :—But the property is attached to an office which may go outside the family.)

I admit that if on enfranchisement the land is held as the self acquired property of the enfranchisee plaintiff has no case, but I submit the land is held as the enfranchisee's ancestral property.

Madras Act 3 of 1895, S. 10 provides for filling up vacancies in the office : by sub section (2) the succession is to devolve on a single heir. These are hereditary estates : the next heir succeeds, and the rights of the others are to treat the land as joint family property, to enjoy portions of them, and to be maintained out of them. That in fact happened here.

(*Lord Buckmaster*) I do not see how the heir succeeds to the office. He succeeds to the right to be nominated to the office.)

His title arose not by nomination but by succession.

Notwithstanding that one member of a family is the Karnam, the others can hold and enjoy the lands as joint family property : *Gunnaiyan v. Kamakchi Aiyar*,² Enfranchisement merely releases the estate from the burden of service : the man who held it before held it on behalf of the family and subject to that burden, he now holds it free from that burden but still on behalf of the family.

Dunne, K. C. in reply : This is and always has been an office which must be the subject of appointment. When there

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1. (1884) I L. R. 8 Mad. 249. 2. (1902) I. L. R. 26 Mad. 349 at p 355.

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is a new appointment a new set of rights arises. Such joint enjoyment as there has been here was a matter of permissive arrangement not of right.

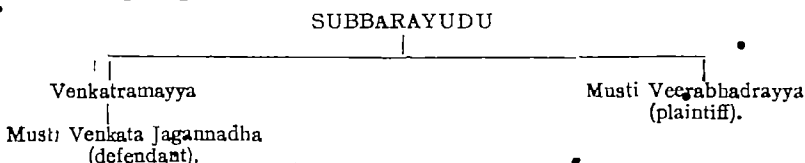
Their Lordships' judgment was delivered (April 21, 1921) by

LORD SHAW : This is an appeal from a decree, dated the 19th February, 1918, of the High Court of Judicature at Madras which reversed a decree, dated the 14th March 1917, of the Temporary Subordinate Judge of Cocanada. This last-mentioned decree remanded the suit so that partition might be decreed in favour of the plaintiff-respondent.

The suit was for the recovery of the possession of a one-half share of lands specified in the schedule attached to the plaint. It was admitted that the suit properties had formed the emoluments attached to the office of Karnam or Village Accountant in the village of Pandalapaka.

These lands were enfranchised, as after mentioned, in the year 1906 by an Inam, a title-deed granted to Venkatramayya, the appellants' father.

The pedigree is as follows :—



The appellant's grandfather Subbarayudu was removed from his office of Karnam for incapacity due to old age, and his eldest son Venkatramayya was appointed Karnam on 23rd February, 1902. Shortly thereafter the former Karnam died.

It is a fact in the case which is admitted that prior to the enfranchisement and Inam grant of 1906 all the family properties which were capable of division were divided into equal shares between Venkatramayya and Veerabhadrayya. No partition took place of the service Inam lands which are in suit in the present case.

The appellant maintains that the respondent had no right to such lands ; that they were not joint family property, and were for that reason not included within the scope of the division made ; and that the enfranchisement of the Karnam lands in 1906 and the procedure with regard thereto are consistent with the view that the lands were impartible and were

confirmed as separate property by the then holder of the office of Karnam ; while upon the other hand the respondent maintains that a division of this particular property, although it is undoubtedly Karnam land, must now be decreed and that the enfranchisement of 1906 could not destroy the nature of the property as joint family property and the interest of the respondent therein.

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The Subordinate Judge took the former view and the High Court took the latter. The question in the appeal is which of these views is correct.

The point in issue is compendiously put in the respondent's case in these terms : " Whether the enfranchisement in the name of the defendant's father enured for the benefit of the family or to himself exclusively ? "

It is admitted that the lands in suit formed the emoluments of the Karnam or Village Accountant. A large body of authority on the subject of the nature of the title to lands so held was cited to the Board. There can be no question of assailing (whatever be the nature of the title to the property itself) the validity of the enfranchisement under the Inam rules. The suit proceeds upon that footing and asks for a division of the property on the assumption that it has been duly enfranchised under the Inam Rules of 1859.

It is, however, highly expedient to note the exact terms of the enfranchisement itself. It is dated the 21st March, 1906, and is signed by Mr. J. A. Atkinson, Inam Commissioner. It is thus expressed :—

" No 1520.

" Title deed granted to Musti Venkataramayya.

" By order of the Governor in Council of Madras acting on behalf of the Secretary of State for India in Council, I acknowledge your title to an inam consisting of the right to a portion of the Government revenue on land measuring (forty-five) 45—83 acres of dry (be the same a little more or less) originally granted for service, and situated in the village of Pandalapaka in the Estate of Pithaput, in the Taluq of Ramachandrapur in the District of Godavari.

" 2. This Inam, being held for, Karnam Service now otherwise provided for shall now be deemed freed of such service, but shall henceforth be subject to the payment of an annual quit-rent of rupees (296.8.0) two hundred and ninety-six and annas eight exclusive of Rupees (24-0 0) twenty-four already payable as jodi to the proprietor, which quit-rent is hereby imposed upon the Inam in commutation both of the said service and of the reversionary interest possessed by Government in the Inam. The Inam is now confirmed to you, your representatives and assigns, to hold or dispose of as you or they think proper, subject only to the payment of the above-mentioned quit-rent and jodi (which quit-rent will be liable to revision

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at the periodical re-settlements of the district), and to the provision of the next clause

" 3, The right of Government to all minerals, if any, in the land referred to in Clause 1 above is hereby expressly reserved to Government, and the revenue referred to in such clause represents only the right of Government to a share in the surface products of such land

Dated 21st March, 1906,

" MADRAS

(Signed) J. A. ATKINSON,
Inam Commissioner."

There can be no question as to the absolute nature of this grant in favour of the appellant's father. The Inam is confirmed "to you, your representatives and assigns, to hold or dispose of as you or they think proper" subject only to the payment of quit-rent, etc., and to the reservation of minerals.

It is worthy of note first that this enfranchisement happens also to be in entire accord with the Standing Order of the Board of Revenue of Madras as to Inams, No. 52 of 1897, and second that the Standing Order makes the distinction between grants which are personal or subsistence grants and those which are Service Inams. It is to the latter category that the enfranchisement in the present case properly belongs. By the Standing Order alluded to it is provided by S. 29 that :—

" XXIX. Inams thus enfranchised, either by the payment of an annual quit-rent or of a single fixed sum equal to twenty years' purchase of the quit-rent, will, like every other description of property, be subject to the jurisdiction of the ordinary Courts of Justice in all questions of disputed right, succession, etc., and they may be mortgaged, sold and transferred in any manner, at the will and discretion of the inamdar, subject to the payment of quit-rent, if such is not redeemed."

The Board has carefully considered the long series of authorities quoted in argument and it is of opinion as follows :—

(1) The lands comprising the emoluments of a Karnam were attached to the office held by him as such ;

(2) When the Karnam for the time being was removed from office he lost all right and title to the lands ;

(3) Although in point of fact there might be even a long continuance of the office in a particular family, the right of the Government and the decision of the Revenue authorities to remove a Karnam from office and to appoint another, were not open to question in Courts of law, and

(4) If this right of selection were exercised in favour of a stranger, there being, for example, within the range of the family (which had been accustomed to have one of its members holding the office of Village Accountant) no person who in the opinion of the Revenue Officer was suitable for the position, then the appointment went to the stranger selected and the

lands with it as emoluments without any claim thereon as a family right by relatives of former holders of the office.

These propositions seem to their Lordships to have been part of the law of Madras long prior to the Acts of 1894 and 1895, which are now to be referred to ; but it is to be observed with regard both to Madras Act No. 2 of 1894 S. 10, and Madras Act No. 3 of 1895, S. 10, that eligibility, whether for nomination to the office of Karnam by the proprietor of the village under the former Act or by the Collector under the latter, is a matter personal to the nominee, clearly taking into account such things, not only as sex and age, but also the physical and mental capacity to discharge the office, and even the educational qualifications of the person selected.

It is accordingly clear that since that time in Madras the Karnam of the village occupies his office not by hereditary or family right, but as personal appointee, though in certain cases that appointment is primarily exercised in favour of a suitable person who is a member of a particular family. It would accordingly appear, apart from the authorities, that lands held as appurtenant to the office so enjoyed should continue to go with that office and should accordingly be impartible.

It may be, however, that the course of authority leads to a different result from that to which principle and administrative convenience would seem to point. Their Lordships will therefore examine the authorities, which, as will be seen hereafter, are conflicting.

In *Srinivasayyar v. Lakshminamma*¹, it was held that where a hereditary village officer who had been dismissed sued to recover land which had formerly been the emoluments of the office and which had been enfranchised and granted to another person holding the office at the time of the enfranchisement, such a suit could not lie. Their Lordships quote the judgment of Turner, C. J., as containing a compact statement of law upon the point :—

“ The lands were attached to the office of Karnam as its emolument ; when the appellant was removed from the office, he lost his right to the land.”

“ The circumstance that money may have been expended on the improvements of the land in the expectation that the office with its emolument would be continued to the family, would not give the appellant any title to recover the land in the events that have occurred. When he was removed for misconduct, the office and emoluments were conferred on a stranger, and with the decision of the Revenue authority

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1. (1888) I. L. R. 7 Mad. 206.

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on that question we cannot interfere. While the office was held by a stranger, the Government resolved to sever the lands from the office and to offer them to the then office-holder for enfranchisement; the holder accepted the offer and became the owner."

The decision, it will be observed, non-suited the former holder of the office from recovering the land. But the same result followed in the subsequent case of *Bada v. Hussu Bhai* ¹ in which a member of the family of an office-holder who had never held the office sued to recover a share of the lands, and the same learned Judge put the point thus :—

"The land was appurtenant to the office, and the Government determined to sever it from the office and to allow the office-holder or office-holders for the time being to enfranchise it. The appellant who was never the holder of the office, could not have a claim on its emoluments."

That this was the law of Madras was stated by the Full Court in the year 1884, in *Venkata v. Rama* ². The judgment of Hutchins, J., in referring to the Full Court thus states the point :—

"To ensure the office being held by a qualified person, the Executive was compelled to reserve to itself the determination of all claims."

Following the line of his dissent, however, he added :—

"But subject to this one condition the absolute right of hereditary succession has been repeatedly recognized."

He dissented, as has been said, on this point from the judgment of the Full Bench. But in the opinion of their Lordships the judgment then pronounced (and it is observed that Turner, C. J., and Muttusami Ayyar, J., were members of the Court), was clear and sound. The Madras Regulations of 1802, 1806 and 1831 are most carefully considered, and the general result is stated in the following sentences of the judgment of Turner, C. J. :—

"When the emoluments consisted of land, the land did not become the family property of the person appointed to the office, whether in virtue of an hereditary claim to the office or otherwise. It was an appanage of the office inalienable by the office-holder and designed to be the emolument of the officer into whose hands soever the office might pass. If the Revenue authorities thought fit to disregard the claim of a person who asserted an hereditary right to the office and conferred it on a stranger, the person appointed to the office at once became entitled to the lands which constituted its emolument."

Even on the footing that the respondent in the present case had established that the office was one in which he as a member of the family had a species of expectation or hereditary right, the decision would equally apply to the present case.

1. (1883) 1 L. R., 7 Mad. 236,

2. (1884) 1 L. R. 8 Mad. 249.

The judgment of Muttusami Ayyar, J., upon this point was clear.

"According to the law, therefore, as it stood prior to the enfranchisement of the Inam, a right to the land could only be legally acquired through the right to the possession of the office, and neither the respondent's father nor the respondent had then any vested interest in the office to sustain an action in the nature of an ejectment."

The same reasoning would have applied to any attempt to partition the lands.

In the opinion of the Board the law of Madras was thus soundly stated and that judgment should not have been disturbed.

It was followed in the case of *Venkatarayudu v. Venkataramayya*¹ and as the judgment of Sir Arthur Collins seems strictly to apply to the present litigation these sentences from it are quoted and are adopted :

"We think that the decision of the Subordinate Judge is opposed to the principles laid down in the Full Bench decision in *Venkata v. Rama*.² The land which formed the emolument of the office of Karnam did not become the family property of the person appointed to the office, although he may have had an hereditary claim to the office. The land was designed to be the emolument of the person into whose hand the office of the Karnam might pass and was inalienable by him. The effect of enfranchisement was to free the lands from their inalienable character and to empower the Government to deal with them as they pleased."

The same result was reached in *Dharanipragada Durgamma v. Kadambari Virrazu*,³ in which the principle of the Full Bench case was again followed.

In *Subbaraya Mudali v. Kamu Chetti*⁴ lands which had been held by a deceased as moniem service inam were enfranchised after his death and sold by his widow. On a claim being preferred by the reversioners for a declaration that the sale was inoperative as against them after the expiration of the widow's life estate it was held that the right of the widow under the grant was not limited to that of a widow's estate." The case was expressly decided as following the Full Bench decision. Subsequently, with one exception about to be noted, the law of Madras up to the year 1899 followed the consistent line which has just been stated.

The difficulty, however, which appeared in the latter decisions sprang from the case of *Narayana v. Chengalamma*⁵. It

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1. (1891) I. L. R. 15 Mad. 284.

2. (1884) I. L. R. 8 Mad. 249.

3. (1897) I. L. R. 21 Mad. 47; 7 M. L. J. 233

4. (1899) I. L. R. 28 Mad. 47,

5. (1886) I. L. R. 10 Mad. 1.

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must, however, be observed that that was not a Karnam case. It was the case of a Palayam; and in their Lordships' opinion the error which has appeared has been in the treatment of these two separate cases as governed by, analogical principle. Running through the decisions of the Madras Courts the same difficulty more than once appears; it arises from the same cause, namely, that the law of the Palayams is treated as the same as the law of the Karnam. This is carried to the point that in 1902 in the case of *Gunnaiyan v. Kamakchi Ayyar*,¹ the Full Court reversed the law that had been laid down by a Madras Full Bench in 1884 in the case of *Venkata v. Rama*.² This procedure has been, of course, full of perplexity and that perplexity must now, if possible, be brought to an end.

The judgment of this Board dealing so fully with the case of a palayam tenure and delivered by Sir John Edge in the case of *Malayandi Appayasami Naicker v. Midnapore Zamindary Company*,³ makes it unnecessary to enter again at length on that topic. The Palayagars were originally "petty chieftains occupying usually tracts of hills or forest country subject to pay tribute and service to the paramount State, but seldom paying either, and more or less independent." The State policy with regard to Palayagars was definitely announced by the proclamation of Lord Clive in 1801. To all intents and purposes the Palayagars were relieved of military duties; they had to give up possession of fire-arms and weapons of offence and become Zamindars: a certain number of pikemen whose names were to be registered were allowed to these chieftains in deference to their personal feelings and "for the purpose of maintaining the pomp and state heretofore attached to the persons of the said Palayagars." The meaning of the proclamation is that their estates were subjected to assessment "upon the principles of Zamindar tenures." Palayagars so treated were dealt with as Zamindars with hereditary estates, their ancestors' possessions being secured to them.

It is accordingly not to be wondered at that when a case of this nature was brought before the Courts as in *Narayana v. Chengalamma*,¹ already referred to, it should have been held that the inam title-deed which had been granted to the

1. (1902) 1 L. R. 26 Mad. 339.

3. (1921) 40 M. L. J. 537.

2. (1884) I. L. R. 8 Mad. 249.

4. (1886) I. L. R. 10 Mad. 1.

Palayagar in that case did not confer any new title and that the enfranchisement had no "larger operation than as a release granted by the Crown in respect of its reversionary interest and of the obligation of rendering service." The decision forms no authority for the 'same principle being extended to the case of a Karnam. It was so interpreted, however, in *Gunnaiyan v. Kamakchi Ayyar* ¹ and Bhashyam Ayyangar, J., applied the law as laid down as to Palayams as "law bearing upon the enfranchisement of Inams whether they be personal Inams or Service Inams." The only difference, said the learned Judge, between that case and the present one "is that in the former the office itself was abolished as unnecessary, whereas in the present case the office was retained an office, the house being attached thereto in lieu of the Inam. This, of course, can make no distinction in principle."

Their Lordships differ from this view. When a Palayam was abolished, in so far as the duty of rendering military service was concerned, the estate was continued with all its hereditary incidents to the Palayagar in the same manner as if possessed by a Zamindar. It is different with regard to the case of a Karnam. A hereditary right in a Karnam or his family can only, at the utmost, be said to constitute a certain *spes* among persons within the area of selection of those eligible for the office. But it is not, as had already been observed, even so limited. The power of selection rests with the administrative officials, who alone are judges of the eligibility of the Karnam for the time being, and it is the settled law of Madras that the emoluments in the shape of lands followed the office, *ex necessitate*. Otherwise the holder of the lands might be some person other than the holder of the office as already pointed out. The analogy fails.

It was, however, decided in the opposite sense by a Full Bench in the case of *Pingala Lakshminpathi v. Bonmireddipalli Chalamayya* ². In a brief opinion it is said that "it is difficult to gather any definite principle common to the majority" in the case of *Venkata v. Rama* ³. The case of *Gunnaiyan v. Kamakshi Ayyan* ¹ was approved. Their Lordships are

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1. (1902) I L. R. 26 Mad. 889.

2. (1907) I. L. R. 30 Mad. 734.

3. (1884) I. L. R. 8 Mad. 249.

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 Lord Shaw.

of opinion that the Full Bench was in error : that the case of a Karnam stands on its own footing and that the principles applicable thereto were properly decided in *Venkata v. Rama* ¹ by the Full Court. The reasons for their Lordships' views have already been sufficiently stated.

To quote and to adopt the judgment of the 25th August, 1902, of Mr. Galletti, Acting Sub-Collector, in this case :—

"This is a suit for the recovery of the Karnam Service Inam lands of Pandalaka. Plaintiff is admittedly Karnam. The land is admitted Karnam's Inam. Judgment for plaintiff with costs."

A warrant of execution dated, the 24th October, 1902, authorising the removal of "any person bound by the decree who may refuse to vacate the same," was also right. It is unnecessary, however, to enter upon questions either of limitation or of *res judicata*, which were referred to in the argument because the case has been disposed of on the merits.

When, accordingly, on the 21st March, 1906, the title-deed already quoted was granted by way of an Inam to the appellant's father and was in express words confirmed to him, and was, "now confirmed to you, your representatives and assigns, to hold or dispose of as you or they think proper," the Board is of opinion that that enfranchisement must be given full effect to, and that it is not subject to be eviscerated or altered by the claim for partition or division put forward by way of defence to the present suit.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, that the decree of the Temporary Subordinate Judge of Cocanada dated the 14th March, 1917, be affirmed and that the appellant be found entitled to costs in the Courts below from the said date and of the costs of this appeal.

A. P. P.

Appeal allowed

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE ODGERS.

Manian alias Subramanian Pattar ... *Appellant (3rd Deft.)* *

v.

Kuthiravathath Kottayil Raman

styled Kuthravathath Nayar

and another

... *Respondents (Petitioner and 1st Deft.)*

Malabar Law—Kanom — Redemption decree — Possession obtained by mortgagor in execution on payment of value of improvements as settled by first court—Enhancement of amount in appeal by tenant—Right of redemption not questioned in appeal—Liability of mortgagor for mesne profits between dates of obtaining possession and of payment of amount of improvements fixed in appeal—Malabar compensation for Tenants Improvements Act, S. 5—Effect.

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In execution of a decree for redemption of a kanom, plaintiff obtained possession of the mortgaged properties on payment to the tenant of the value of improvements as settled by the first court. In an appeal by the tenant regarding the amount of the value of improvements but not with respect to plaintiff's right to redeem, the amount of the value of improvements was enhanced by the appellate court. On a claim by the tenant against the mortgagor for mesne profits for the period between the date of the latter obtaining possession in execution and that of his execution and that of his depositing the amount fixed by the appellate court, held that as the mortgagor could not be said to have been wrongfully in possession during that period, he was not liable for mesne profits.

Appeal against the order of the Court of the Subordinate Judge of South Malabar at Calicut in A. S. No. 266 of 1918 (A. S. No. 653 of 1918 on the file of the District Court) preferred against the order of the Court of the District Munsif of Alatur in E. P. No. 174 of 1918 in O. S. No. 391 of 1915.

C. Madhavan Nair, for appellant.

P. V. Parameswara Aiyar, for respondent.

The Court delivered the following

Judgment :—The plaintiff-respondent obtained a decree for redemption of the kanom properties against the third defendant and in execution of that decree, obtained possession of the properties after paying to the third defendant the value of the improvements as settled by the court of trial. The 3rd defendant appealed against the decree with reference to the amount awarded for improvements : but he did not take any objection to the decree as to the right of the plaintiff to redeem.

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The Appellate Court enhanced the amount payable on account of improvements, and to that extent, modified the decree of the Lower Court. The 3rd defendant now claims mesne profits for the period from the date when the plaintiff obtained possession to the date when he deposited the value of improvements as fixed by the Appellate Court. In support of his claim the contention is put forward by the 3rd defendant that the decree for redemption and possession of the trial court was superseded by the decree of the Appellate Court, and as under the Malabar Law, the kanomdars are entitled to remain in possession of the property until compensation is paid to them for the improvements effected by them, the 3rd defendant was entitled to remain in possession of the property until the plaintiff paid the enhanced amount as found by the appellate court. The answer to this contention is that under S. 5 of the Malabar Compensation for Tenants' Improvements Act, the tenant is not entitled to remain in possession after a decree in ejectment. Here there was a decree for ejectment which was not even challenged in appeal and the plaintiff lawfully obtained possession under that decree. It is difficult to see how the 3rd defendant, the tenant can say that he was entitled under S. 5 of the Malabar Compensation for Tenants' Improvements Act to remain in possession, and claim mesne profits. Mesne profits are payable by a person who is in wrongful possession of another's land but it is difficult to understand how the plaintiff can by any stretch of language be said to be in wrongful possession of the lands in the suit of which he obtained possession under a proper and effective decree of Court.

Reliance was placed on a judgment of this Court in C. M. S. A. No. 123 of 1914 but the facts of that case were very different from those we have got to deal with in this case. There, the decree of the first court had been reversed by the Lower Appellate Court and in the meantime the plaintiff had obtained possession and the decree of the Lower Appellate Court was set aside by the High Court in Second Appeal.

It seems to be quite clear that the 3rd defendant's claim for mesne profits is quite unfounded.

The appeal is therefore dismissed with costs.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE NAPIER.

Parasurama Udayan and others

... Appellants^{*}

v.

A. Vedaji Baskar Thirumal Row and others. ... Respondents.

Trustee—Delegation of duty by—Validity—Appointment and dismissal of hereditary temple servants—Delegation of power of.

The power of appointment and dismissal of hereditary temple servants who cannot be dismissed (without sufficient cause such as grave misconduct being established) is not one of the powers of a trustee which are capable of being delegated to an agent.

Krishnamachar v. Rangachari, I. L. R. 16 M. 73 referred to.

Second Appeals against the decree of the court of the Temporary Subordinate Judge of Vellore in A. S. No. 214 of 1918 preferred against the decree of the Court of the District Munsif of Vellore in O. S. No. 116 of 1917 (O. S. No. 1245 of 1915 on the file of the Court of the District Munsif of Arni.)

S. T. Srinivasa Gopalachari, A. Krishnaswami Aiyar and B. C. Seshachela Aiyar for appellants.

C. Madhavan Nair for respondents.

The Court delivered the following

Judgments : *Sadasiva Aiyar, J.* These are two connected Second Appeals from the same judgment pronounced by the Subordinate Judge, Vellore as the Lower Appellate Court. In one of these second appeals, the appellant is the fifth defendant, and in the other, the appellants are the defendants Nos. 1 and 2. The facts of the case shortly stated are these. The plaintiff is the hereditary trustee of a temple called the Kasivisvanatha Swami Temple situated in a village included in his Arni Jaghir. The 4th defendant is the hereditary archaka (temple priest) in the said temple and along with the hereditary office has inherited the right of enjoying the emoluments of certain manyam lands attached to the archaka service. In the year 1894 the elder brother of the 4th defendant who is the father of the 5th defendant and who was then the hereditary archaka granted a permanent lease of the plaint lands in favour of the father of defendants Nos. 1 to 3. The plaintiff executed a power of attorney, Exhibit D, in January 1915 in favour of

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one K. V. Lakshmana Rao, appointing him as (what the document describes as the) Commissioner and Agent to do several acts, functions and duties and to exercise several powers. One of such duties and powers which are granted under this deed Exhibit D is described in paragraph 9 as follows: "He" (i. e. the said Commissioner) "is authorised to appoint, dismiss, suspend or fine all Devastanam servants of my Jaghire and hold enquiries with regard to Devastanam and Service Inams of my Jaghire and take necessary steps for the proper management of the said Devastanam". Purporting to act under this clause, Mr. Lakshmana Rao enquired into the conduct of the defendants Nos. 4 and 5 (the fifth defendant was a minor at that time) and dismissed them from their office, of archakas on the 30th July 1915. This suit is brought (basing that dismissal as the cause of action) for the recovery of the lands from all the defendants, and also for a declaration that the lands belong to the suit temple. Defendants Nos. 1 to 3 (whose father obtained the permanent cowle) went so far as to deny that the lands were temple lands and raised several other defences which it is unnecessary to set out in detail. Defendants Nos. 4 and 5 pleaded that it was only the melwaram of the lands that belonged to the suit temple and was granted as service manyam and that their dismissal by Mr. Lakshmana Rao was invalid, they being hereditary archakas who were not guilty of any such misconduct as could justify their dismissal. They seem also to have raised at the time of the framing of the issues the contention that the proceedings of Mr. Lakshmana Rao dismissing them were not legally valid because the delegation of the right of enquiry into the misconduct of hereditary archakas by the plaintiff to Mr. Lakshmana Rao was legally not justifiable. (Several other pleas were also raised which, again, it is unnecessary to set out).

The first issue raised in the case was whether the plaintiff can sue on behalf of the plaintiff mentioned temple. The District Munsif subdivided this issue into three, viz., (1) whether there was sufficient ground for the dismissal (that is of the defendants Nos. 4 and 5) : (2) whether the defendants Nos. 4 and 5 could be legally dismissed and (3) whether the Commissioner was competent to dismiss in the place of the Jaghirdar. I think the question No. 3 should be answered in favour of the contention of the defendants Nos. 4 and 5 because, a trustee cannot

appoint an Agent to do acts in which judicial discretion was intended to be exercised by himself (the trustee). The power of appointing an Agent exists in a trustee only as regards matters in which expert knowledge is required or in which it is usual (according to the course of the business) to employ Agents in respect of particular acts or where it is a matter of necessity (using the word "necessity" in a business sense) to do so (and similar exceptional circumstances). The power of appointment and dismissal of hereditary temple servants who cannot be dismissed (without sufficient cause such as grave misconduct being established) is not one of the powers of a trustee which are capable of being delegated to an Agent. This principle of law is recognised in *Krishnamachar v. Rangachari*¹ and I do not think it necessary to quote in support of the above principle the observations in cases (English and Indian) in which this matter has been considered. Defendants Nos. 4 and 5 were thus not validly dismissed and it follows that the plaintiff's claim to recover possession of the plaint lands must be negatived. Having regard, however, to the facts that the defendants Nos. 1 to 3 even denied that the lands belonged to the temple, and that the defendants Nos. 4 and 5 alleged that only the melwaram belonged to the temple and also to the contention put forward by all the defendants that the permanent lease in favour of defendants Nos. 1 to 3 is binding on the temple, I would grant in favour of the temple the following declaratory reliefs:—

(1) that it be declared that the plaint lands belong to the temple and are held by the defendants Nos. 4 and 5 as archakas of the temple and

(2) that the permanent lease granted in favour of the father of the defendants Nos. 1 to 3 is not binding on the temple.

The parties will bear their respective costs throughout.
Napier, J :—I agree.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ABDUR RAHIM, AND MR. JUSTICE BURN,

Vaithinatha Aiyar and another ... Appellants* (Defendants)

v.

S. Tyagaraja Aiyar and another ... Respondents (Plaintiffs)

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raja Aiyar.

Civil Procedure Code S. 92—Interest within the meaning of—Question of fact—Founder's descendants—Their interest to maintain a suit under S. 92—Whether courts in a suit under S. 92 can enquire whether certain properties are trust properties—Gift of income of property to charity without limitation—Gift of property itself—Trustees denying the public character of the trust—Whether and when can be removed—Documents describing trust properties as family properties—Effect to be given to expressions in moffussil conveyance.

Where the two plaintiffs instituting a suit under S. 92 of the Civil Procedure Code are the descendants of the founder of the charity, a chatram and the first plaintiff is a person entitled to succeed to the family properties in a certain contingency and the 2nd plaintiff though a pleader in a different place has several houses in the place where the charity has to be conducted and frequently visits the ancestral house, *held* that the plaintiffs have an interest within the meaning of S. 92 of the Code of Civil Procedure.

Whether the plaintiffs instituting a suit of this character have an interest within the meaning of S. 92 or not has to be determined upon the facts of each case bearing on the relation of the plaintiffs to the charity with reference to which the suit is brought.

The fact that the plaintiffs belong to the family of the founder would naturally give them an interest in the family charity so as to enable them to bring a suit under S. 92 of the Civil Procedure Code.

T. R. Ramachandra Aiyar v. Parameswara Unni 42 M. 360 distinguished.

Gauranga Sahir v. Sudeni Mata 40 M. 612 followed.

Where the Court is asked to frame a scheme under S. 92 of the Civil Procedure Code one of the essential enquiries to be made is what are the properties belonging to that charity; and for that purpose the court is entitled to go into the construction of the deed of endowment and other documents

The gift of the income of a property to a charity without any limitation is a gift of the property itself.

10 English Reports 786 at page 808 and L. R. 14 Eq. 456 followed.

The mere denial by a trustee of the existence of a public trust, if bonafide, does not by itself disqualify him from being appointed or retained as the trustee of the institution,

Where however the trustees appointed by the founder's heir persistently contended that the charity is not a public foundation at all and the property of the charity was the private property of the family and participated in violations of trust prior to their appointment, with the knowledge that the trust is a charitable trust it is a fit case for the removal of such trustees from the office by the Court.

The correct thing for a trustee of a charity demising the charity properties is to describe the properties as belonging to the charity and to state that he is making the demise in his character as trustee. In this country the forms of conveyance are not strictly observed especially in the districts and in judging whether properties

are trust properties or private properties, courts are not justified in attaching importance to casual expressions in documents describing them as ancestral properties and in the enjoyment of the executants of the deed.

Appeals against the decrees dated 15th day of 1916 and 30th day of September 1918 of the Court of the Subordinate Judge of Kumbakonam in Original Suit. No. 90 of 1916.

T. Rangachariar for appellants.

K. Srinivasa Aiyangar and K. Narasimha Aiyangar for respondents.

The Court delivered the following

Judgment :—This appeal arises in a suit filed under S. 92 of the Civil Procedure Code with reference to a choultry and the properties alleged to be endowed for the use of that choultry. The two plaintiffs are relations of the founder and the two defendants allege to be the lawfully appointed trustees under the will of one Suriyanarayana Aiyar who according to the plaintiffs was the last surviving trustee of this charity. Suriyanarayana Aiyar was one of five brothers, the sons of one Kalyanarama Iyer. The other four brothers were Sivasubramaniya Aiyar, Venkataranga Aiyar, Swaminatha Aiyar and Sivarama Aiyar. Kaliyanarama Aiyar had also several daughters one of them being the mother of Thiyagaraja Aiyar, the 1st plaintiff. 2nd plaintiff is the son of the adopted son of another daughter of Kaliyanarama Aiyar. One daughter of Kaliyanarama Aiyar named Subbuthayi Ammal is still alive all the sons and the other daughters having died previous to the institution of the suit. The first question which has been argued before us by Mr. T. Rangachariar, the learned vakil for the defendants, is whether the plaintiffs have an interest within the meaning of S. 92 of the Civil Procedure Code sufficient to enable them to maintain the suit. He relies strongly on the decision of a Full Bench of this Court in *T. R. Ramachandra Iyer. v. Parameswaram Unni*¹ which lays down that a person suing under the provisions of this section must have a substantial interest and not merely a remote contingent or hypothetical interest in the charity in question. Since that decision a bench of this court have considered its effect in Appeal No. 196 of 1918, the facts of which have much resemblance to the facts of this case. Whether the plaintiffs instituting a suit of this character have an interest within the meaning of S. 92 or not

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has to be determined upon the facts of each case bearing on the relation of the plaintiffs to the charity with reference to which the suit is brought. In this case the plaintiffs are, as stated, the descendants of the founder of the charity. The 1st plaintiff on the death of Subbuthayi Ammal in the absence of Kaliyanarama Aiyar's dayadees, would be entitled to succeed to the family properties.

Mr. Rangachariar has argued that there is evidence to show that there are dayadees of Kaliyanarama Aiyar in existence. That evidence is of an extremely vague character, and in any case it is not shown that they are taking any interest in the preservation of the charity or in any of the affairs of the family generally. With respect to Subbuthayi Ammal also, it does not appear that she interests herself in the proper maintenance of the charity. The 1st plaintiff resides in Madras, but he occasionally visits Perumandi village, the ancestral home where the choultry is situate. The 2nd plaintiff is a pleader practising in the Native State of Pudukotta. He has several houses in Kumbakonam and he often visits the ancestral family house. No doubt it has been laid down that the mere fact that the plaintiff suing under S. 92 C. P. C. is a Hindu and is entitled to worship in a temple would not give him interest enough to maintain a suit under S. 92, C. P. C. In applying the analogy of that case to this choultry we have to bear in mind the further facts that the plaintiffs belong to the family of the founder and that fact would naturally give them an interest in the family charity. It has been ruled by a Full Bench of this Court in *Gauranga Sahu v Sudevi Mata*¹ that the heirs of the founder have considerable interest in the maintenance of the charity, and the Hindu law gives them the right to nominate trustees in the case of a vacancy and in the absence of any provision in the deed of endowment for the appointment of trustees. In our opinion therefore the Full Bench decision of this court above referred to does not preclude us from holding that the plaintiffs having regard to the facts proved in the case have an interest within the meaning of S. 92 C. P. C. sufficient to enable them to maintain the suit.

The next question argued by Mr. Rangachariar is of a still more general character, namely, that this choultry is not a public trust, but is nothing more than a private guest house

¹ (1916) I L. R. 40 Mad. 612.

built by Kaliyanarama Aiyar and to a suit in respect of it therefore the provisions of S. 92 C. P. C. have no application. The appellant's contention is that a public trust of this character was created later on by the provisions of the will of Suri Aiyar already referred to, and that until then it was private property of the family or at the most a private trust which the members of the family were entitled to put an end to in certain contingencies. At all events it is said there was no dedication to public uses except under the will of Suri Aiyar.

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The question really depends upon the inference to be drawn from the evidence in the case, mainly the documentary evidence ranging from 1864 as there was no deed executed by the founder with reference to this choultry when he built it. Some question is raised as to who the actual founder was whether the choultry was built by Kaliyanarama Iyer or by his father Rajappa Iyer. But the plaintiffs in their plaint state that it was constructed by Kaliyanarama Aiyar. We think that we ought to proceed on that basis though there is evidence, even of witnesses on the side of the defendants, to show that the choultry was some time known as Rajappa Iyer's. The earliest document is of 1864 a deed of partition between the five brothers, Exh. A. The document speaks of this choultry as "Peruniandy chathram which is the Dharmam and which is being conducted in the family from the beginning and it mentions the nanjah and punjah and lands of other description which are attached to the chathram of which some are in the Perumandi village, some in Alankurichi and some in Thennalur village. These are the lands which form the properties mentioned in the plaint B schedule items 1 to 17. Chathram itself and the lands surrounding it form the A schedule. Then it is provided that the five brothers shall manage the chatram according to the order of seniority. The document speaks of these properties being given to the chatram. It is important to note this fact that income yielding properties were attached to this chatram and were set apart for its maintenance, and the brothers while partitioning the family properties did not think of dividing the chatram properties. If it was merely a private guest house as argued on behalf of the appellants one would not expect any properties being set apart for its maintenance, nor would there have been a provision for its maintenance by each member of the family in turn. It was

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pointed out that there was no provision made for the appointment of trustees after the death of the five brothers. But that cannot make any difference. When we find that income yielding properties are set apart for the maintenance of the chatram it might well have been within the contemplation of the brothers either that they would later on make a further provision with respect to its management or that its management should be carried on by the succeeding members of the family in succession to themselves. The next document of importance is the will of Swaminatha Iyer, Ex. C. The construction of this will is one of the questions for decision in the appeal, which we shall deal with later on. It is sufficient to mention here that by this will the executors appointed therein are directed to feed poor people "in our family choultry in Perumandi now under the management of K. Venkatranga Aiyar." That is not the sort of provision which would have been made if this chatram were the private property of the original undivided family. The burden of the maintenance of the chatram would in such cases fall on the surviving descendant of Kaliyanarama Aiyar. The will of Swaminatha Aiyar clearly implies consciousness on his part that the chatram is a public trust created by the ancestor of the family. Very soon afterwards *i.e.*, in 1892 a deed of surrender Ex. B was executed by Sivasubrahmanya Aiyar in which he says "as I have already left the chatram belonging to our family and situated in Agara Perumandi village and the nanjah and punjah lands etc., all matters belonging to it to the management of Venkatranga Iyer because of my inability to manage the same." In another place he speaks of nanjah and punjah lands "belonging to the said chatram". We may mention here that much stress was laid by Mr. Rangachariar on the use of the phrase "chatram belonging to our family or 'family chatram' and similar phrases of that character used in this and other documents. But in our opinion such expressions do not suggest any inference against the existence of public trust with respect to this chatram; all that they mean is that it was founded and maintained by the family. Then there is the will of Venkatranga Aiyar executed in 1884, Ex. H. and by that will a contingent interest is given in his properties to the chatram and provision is made for the administration of the choultry and its

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properties by the Government in case the contingency happens and it describes the choultry in so many words as a charity choultry built by the ancestors of the testator. No explanation has been suggested as to why this choultry should have been described as charity choultry and why its maintenance and of the properties attached to it should have been provided for if it was not a public trust. It could not be suggested that Venkatranga Aiyar would have thought of dealing with this choultry as a public charitable trust if as a matter of fact it was a private property in which other members of the family were beneficially interested, nor would he have entrusted the management to the Government in certain events if it was not a public trust." Suri Aiyar was the last survivor of the five brothers. He was a District Munsif and afterwards Subordinate Judge. He died after retirement from service in 1913. As already mentioned, the appellants' case is that it was Suri Aiyar who for the first time created a public charitable trust of this choultry and of the properties belonging to it. The will however shows that he did not want to change the character of this choultry; on the other hand what he intended was to keep up its original character and to endow it with some more properties of his own. He speaks of the choultry as his family choultry and of the building and landed properties as belonging to it. It was pointed out that he states that they were in his possession and enjoyment. That does not necessarily mean that they were in his possession and enjoyment as a beneficial owner but he only means that he was in management of them as he makes it clear in other parts of the will. For instance in paragraph 11 he provides for the management of the choultry and of the entire properties attached thereto. There is another document Ex. D., which is a deed of relinquishment executed by Sivasubramania Iyer in 1892 in favour of Suri Iyer. There he speaks of the trusteeship of the Dharma chatram founded by forefathers and gives up all claims with respect thereto for the consideration of an annuity of Rs. 20 to be paid by Suri Aiyar. Mr. Rangachariar objected to the admission of this document on the ground that only a registration copy was produced and that it was not duly proved. No such objection was taken in the lower court and even in the grounds of appeal before us. All that is stated is that the lower court did not construe the document properly. Then it was argued that this deed of agree-

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ment suggests that Sivasubramania Aiyar laid claim to the chatram and its properties. With respect to this it has to be borne in mind that Sivasubramania Aiyar managed to get rid of the ancestral properties that fell to his share at rather an early date, and that he was depending more or less upon the charities of Suri Aiyar. It is evident that this man was trying to get whatever he could get from Suri Aiyar. It would seem that Suri Aiyar in order to save himself further worry or trouble agreed to give him a small stipend and obtain from him a deed of relinquishment in his favour. On the other hand the recital to which we have referred shows that the choultry was regarded as a charitable institution. All these documents therefore to which all or some of the members were parties strongly support the case of the plaintiffs that the choultry with properties attached to it is a charitable trust.

Mr. Rangachariar has relied upon a number of lease deeds and muchilikas in which the properties in dispute are described as ancestral property and enjoyed by the executants of the deed, that is by one of the five brothers who at the time was in management of this choultry. But we do not think that any valuable inference can be drawn from these documents. No doubt the correct thing for a trustee of a choultry demising the charity properties is to describe the properties as belonging to the charity and to state that he was making the demise in his character as trustee. In this country the forms of conveyance are not strictly observed especially in the districts and we should not be justified in attaching any importance to casual expressions in documents like, Exs. II series, VI series, V series and VIII series. Special reference was made to the inam title deed with respect to some lands in Thirumallur village Ex. IX. We are asked to draw an inference in the defendant's favour from the absence of any description in the title deed as to the grantee being a trustee of the choultry. But we do not think that this is a matter of any importance as the description stands on the same footing as that in the lease deeds. Much reliance was placed on the fact that in 1878 some land in Thennur village was usufructually mortgaged. But then as pointed out by the subordinate Judge, it has been redeemed and included even in Suri Aiyar's will as property belonging to the choultry.

The other piece of evidence on which the appellants place much reliance is with reference to the exchange of a piece of vacant land in Ex. III A and included in schedule A. The superstructure on the land was subsequently made a gift of to another person and purchased by Suri Aiyar under Ex. III. In this very document it is stated that the superstructure and the building belonged to the Dharmachatram. The documentary evidence on the whole is, strongly in support of the finding of the subordinate Judge that the choultry was a charitable public trust.

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As regards the evidence of the actual use of this choultry there can be no doubt the wayfarers were used to be accommodated there and that the Brahmins also were fed in the choultry. Even one of the defence witnesses D. W. 5 an old man whom the Judge has believed on this point speaks of the Brahmins being fed in the choultry and wayfarers being lodged there. No doubt there is evidence to show that Suri Aiyar the last trustee, did not think that the feeding of Brahmins was very much of a charitable act, though he himself provided for the feeding of Brahmins by his own will. It was also pointed out by the learned vakil for the appellants that Suri Aiyar sometimes when visiting the village put up in this choultry and that some family idols were kept there. These are small matters and cannot have much significance considering that the choultry was managed all along by the members of the family. We therefore agree with the finding of the subordinate Judge that this choultry was a public trust from the very beginning and therefore the suit with respect to it and its properties is maintainable under S. 92 C, P. C.

The next question argued was whether the properties in A and B schedules form part of the endowment. It appears that one of those properties was sold long ago and Mr. Rangachariar wanted to adduce in this court as evidence, a document purporting to be the deed of sale with reference to the transaction. The defendants had not taken the trouble of finding out the document and producing it in the lower court. That property is not claimed in this suit and there is no evidence to show the circumstances in which the property came to be sold. It might be as suggested by the subordinate Judge that it was sold for purposes binding on the chatram. We have already dealt with the question relating to the lands which are the subject matter

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of Ex. III and III-A and of usufructuary mortgage. Ex. II We agree in the conclusions of the subordinate Judge that the properties in A and B schedules attached to the plaint form part of the endowment of this choultry. As regards schedules C. to F. some properties have been alienated and the alienees are not parties to this suit. So far as those properties are concerned as pointed out by the Subordinate Judge any finding in this suit cannot bind the alienees. This question is dealt with by him under the 11th issue. We agree with the Subordinate Judge that it will be open to the trustees appointed under the scheme to sue the alienees in respect of the alienated properties.

As regards the construction of Exh. C, the will of Swaminatha Aiyar, the learned Subordinate Judge has held that the choultry has a claim to 7/9th of the properties. It was contended by Mr. Rangachariar that we are not entitled in this suit to go into the question of the construction of Swaminatha Aiyar's will. But we accept the contention of Mr. K. Srinivasa Aiyangar that under S. 92, C. P. C. when we are asked to frame a scheme one of the essential enquiries to be made is what are the properties belonging to the charity. We are not directly concerned in this suit with the administration of the will of Swaminatha Aiyer. But as the defendants who are in possession of the choultry and its properties deny that the choultry is entitled to any benefits under the provisions of Ex. C as claimed by the plaintiff, it is open to us to go into the question. It was suggested that the gift in favour of the choultry is not to take effect until the executors appointed by the will have paid the debts. The will was in 1881. There is not an iota of evidence that any debts of Swaminatha Aiyer remain undischarged. The executors appointed under the will are dead and we think we may safely conclude that there are no debts left to be paid and that the contingency upon which the charity was to get 1/3rd of the income has arisen.

As regards 2/3rds of the income of the properties given to the wife which the will directs to be utilised for Dharmam on her death, it is argued that the reference there is not to this choultry but to charity generally. The learned subordinate Judge has held that the word 'Dharmam' refers to this choultry and we think he is right in that construction. In view of the will the choultry becomes entitled under Ex. C to 7/9ths of the income of the properties.

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It is next argued that we must hold that there was a special endowment or Kattalai, as it is called, created by Swaminatha Aiyar, and such a special endowment should not be mixed up with the properties originally dedicated to the choultry. No doubt the provisions of Swaminatha Aiyar's will are to be carried out by the executors, Venkataranga Aiyer and Suryanarayana Aiyer. Both of them are however dead. If there is a gift as we hold there is, in favour of this charity it is within the competence of the court in this suit to make a suitable provision for its administration in any scheme that is to be framed, especially as there is no provision in the will for the administration of these properties after the death of Venkataranga Aiyar and Suryanarayana Iyer.

It was further argued that the gift of the income from the properties devised under Ex. C. does not amount to a gift of the properties themselves but only creates a charge in favour of the choultry. We do not think however that this is a sound proposition. The gift of the income of a property without any limitation is a gift of the property itself. See *South Moulton Corporation v. Attorney General* ¹ : also *Mannox v. Greever* ².

The last important question to be determined relates to the effect of Suri Aiyar's will. It is contended on behalf of the appellants that Suri Aiyar, being a descendant of the founder of this charity, Kalyanarama Aiyar, as last trustee was entitled to appoint the 1st and 2nd defendants and also one Jaya Krishnachari as trustees. Two issues were raised with reference to this question. One was whether Suri Aiyar was competent to make the appointment and if so, whether the appointment was bona fide. And the 15th issue raised the question that if the defendants were appointed they should be removed from office. The learned Subordinate Judge has held that the appointment of these two persons was not *bona fide* and has also found facts which show that these persons cannot properly be trustees of these properties. He says that Suri Aiyar did not believe in the utility of feeding Brahmins in the choultry that his conduct also shows that he was not really interested in maintaining the choultry but that he was more interested in providing for a woman whom he calls his foster daughter namely Rangathammal, that the 1st and 2nd

1. 10 Eng. Rep. 796 at p. 808.

2. L. R. 14 Eq. 456.

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defendants are brothers and hangers on of Suri Aiyar, and that the 1st defendant who worked for him as a sort of gumastah acquired a great deal of unwholesome influence over him and that Suri Aiyar put these properties in their charge not so much for the defendants' benefit of the charity as for their personal benefit and for the benefit of Rangathammal. We shall assume that Suri Aiyar as the surviving descendant of the founder was entitled under the Hindu Law to nominate trustees and to make provisions for the management of the trust. But it is a right the exercise of which the court is not bound to uphold if in its opinion the person nominated by the founder's heir as trustee is not fit to hold the office. As laid down by the Privy Council in the well known case from Rangoon, *Mahomed Ismal Ariff v. Ahmed Moola Dawood* ¹ the interests of the trust are supreme and the court must have regard to such interests in dealing with the question whether the persons appointed as trustees are persons who can be properly entrusted with the management of the institution. These two persons, the 1st and 2nd defendants are absolute strangers to the family though they alleged certain relationship to the family which allegation is found to be false. The 1st defendant is not a man of any means, and the learned subordinate Judge who tried the suit is not satisfied that the 2nd defendant's career was not such as to inspire confidence. Besides as pointed out by Mr. K. Srinivasa Aiyengar, the defendants have persistently contended that the choultry was not a public foundation at all and that the property claimed as public trust was the private property of the family. The subordinate Judge has found that the 1st defendant aided and abetted Suri Aiyar in his violations of the trust. The 1st defendant certainly must have known that the choultry was a public charitable trust. He must have known that the travelers used to be accommodated there, that Brahmins used to be fed there and that it was regarded by the family including his master Suri Aiyar as a charitable trust and not as the private property of the family. This court has no doubt held that the mere denial of the existence of a public trust, if bona fide, does not by itself disqualify the man from being appointed or retained as trustee of the institution. We are convinced as was the learned subordinate Judge that this is not such a case and that under the circumstances the appointment

1. I. L. R. 43 Cal. 1085.

of defendants 1 and 2 as trustees should not be upheld and they should be removed from the trusteeship of this foundation. The 3rd trustee Jaya Krishnamachari is dead. It will therefore be open to the lower court in framing the scheme to appoint proper trustees for the institution.

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Mr. Rangachariar argued that some properties mentioned in F Schedule which were disposed of by Suri Aiyar by his will did not in fact belong to him, some of them being properties belonging to some temple at Nagarkudi, some of them being service maniams and that they were in the possession of Suri Iyer on behalf of the temples and the service holders. These properties are mentioned in paragraphs 9 and 9 (a) of the written statement and there is no finding of the Subordinate Judge with respect to them.

Items 172 to 179 were purchased by Suri Iyer in execution of a decree for rent obtained by himself in 1912 and portions of items 91 and 92 claimed in the written statement and the whole of item 170 were similarly purchased by him in 1903 in execution of another decree. Mr. Ganapathi Aiyar for the defendant claimed these properties as belonging to Suri Aiyar by right of his purchase. These items belong to Nagarkudi village and the case of the plaintiffs was set out in their plaint that the Nargakudi village belonged to Swaminatha Aiyar and was disposed of by him in his will and under that will as we have held the choultry became entitled to 7/9th property. There is no evidence to show that Suri Aiyar was in possession of these items before Swaminatha Iyer's death. Presumably he was in possession as an executor under Swaminatha Aiyar's will. It is argued that he might have purchased the properties from his own funds, but then it must be borne in mind that he mixed up the trust property with his own and alienated a number of trust properties referred to in C D and E schedules. The defendants did not produce accounts which if their case was true would have shown whether the properties were purchased by Suri Aiyar with his own money or with the moneys belonging to the trust for the choultry. Under these circumstances we must hold that these items belonged to the choultry.

As regards item 171, called Illuppai tope of which Suri Aiyar was in management on behalf of a certain temple called Kailasanatha Swami temple and a manyam belonging

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to the same temple and another temple of Varadaraja Perumal, *i. e.*, items 189 and 183, Suri Aiyar was apparently in possession of these properties as Mirasidar of the village. It is contended by the learned vakil for the plaintiff that as the choultry owns considerable lands in Nagarudi village the trustees whoever may be appointed for the choultry should have the management of these items as Mirasidar but we cannot accept this contention as there must be other Mirasidars : it is the entire body of Mirasidars who could make arrangement for the management of these properties as they may choose. It may be open to them to make over charge of these items to the trustees of this choultry if they so choose. But we cannot hold that the trustees would be entitled as of right to have possession and management of these properties. 17 kulis of item 8, 21 kulis of item 19 and the whole of items 24 to 26 belonged to Sellathammal the widow of Swaminatha Iyer. Suri Aiyar would be the reversionary heir of Sellathammal and there is really no evidence upon which we would be justified in holding that these items belong to the chatram. The manyams claimed by the defendant—service Maniyam's, barber's, washerman's, carpenter's and watchman's are items 43, 60, 78 and 84. The Mirasidars of the village would be entitled to the management of these Maniyams for the reasons already given in respect of items 171, 180 to 183. We cannot hold that the trustees of the choultry would as a matter of right be entitled to possession of these Maniyams. The result is that items 171, 180 to 183, 17 kulis of item 8, 21 kulis of item 19, items 24 to 26, and items 43, 50 and 84 mentioned in schedule to the written statement at page 21 will be excluded from the decree. In all other respects, the lower court's decree is confirmed and the appeal dismissed with costs, the costs to be paid by the defendants personally as we do not think that this is a proper case in which the costs of the appellant should come out of the trust estate.

Mr. K. Srinivasa Iyengar has asked for special vakil's fee but we cannot say that the appeal involved any points of special difficulty. The usual fee will be allowed.

Appeal No. 330 of 1918 will be dismissed but as accounts will have to be taken, there must be a direction that the defendants do render accounts of the properties from the date of the death of Suri Aiyar. The Subordinate Judge will expedite

the appointment of trustees as there are properties in the hands of the alienees and as it is apprehended that some suits might be barred if there be any further delay. The costs of both parties in this appeal will come out of the estate.

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PRIVY COUNCIL.

PRESENT :—LORD BUCKMASTER, LORD DUNEDIN LORD SHAW AND SIR JOHN EDGE.

(On Appeal from the High Court of Judicature at Madras.)

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v.

Arumilli Subbarayadu and others ... *Respondents.*

Arumilli Ramanna and others ... *Appellants.*

v.

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Fiduciary relationships in India—Do not invariably involve all the duties of an English trustee—Hindu Law—Adoption—Share of adopted son among Sudras in Madras when legitimate son is subsequently born—Dattaka Chandrika, its authority.

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The rules applicable to accounts between trustees and *cestuis que trustent* in England do not invariably apply to fiduciary relationships in India; e. g., to the case of a manager of a joint family who, except where misappropriation is proved, is liable to account only for what he has actually received and not for what he ought to have received.

Among Sudras in Madras the adopted son shares equally with the subsequently born Aurasa son. The rule to that effect first propounded in the Dattaka Chandrika has been accepted and acted upon by the Hindus in Madras for over a century, and may now be regarded as established law.

Dictum of *Turner C. J.* and *Muttuswami Aiyar, J.* in *Raja v. Subbaraya* 1. *Appr.*

Karuturi Gopalam v. Karuturi Venkataraghavalu 2 *over ruled.*

The Dattaka Chandrika has been long accepted in Southern India as a high authority on the law of adoption, but where its propositions are not based upon authentic texts it is necessary to enquire whether they have in fact been accepted and acted upon as law.

Consolidated appeals from a decree of the Madras High Court, modifying a decree of the Subordinate Judge of Rajahmundry.

The facts of the case are sufficiently stated in their Lordships' judgment. The arguments on the various questions of account, which were of no general interest, are not reported. The remaining question was whether among Sudras in Madras

* P. C. App. No. 18 and 19 of 1919 February 24 25 and 28 and March 1, 1921, 1. (1888), 1.L.R. 7 Mad. 253 2, (1915) 1.L.R. 40 Mad 632. 29 M. L. J. 710.

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an adopted son on partition of the family property shares equally with an after-born legitimate son. The Subordinate Judge held that he does: the High Court, (Ayling and Srinivasa Aiyangar, JJ.) that he takes a fourth only of a natural born son's share.

Hence this appeal.

Dunne, K. C. (*Parikh* and *Narasimham* with him) for appellants : The question is whether the general rule which gives one fourth of the share of a natural born son to the adopted son when a natural son is subsequently born, applies to Sudras. We submit, on the authority of the *Dattaka Chandrika*, S. 5 para. 29 that it does not, and that the adopted son takes an equal share. Respondents rely upon a text of *Vasistha*, cited at para. 17 of the *Dattaka Chandrika*, and argue that para. 29 is bad law because in conflict with that text. We submit that para. 29 merely makes an exception in the case of Sudras, and that there is good reason for the distinction. Among the three twice born castes, the adoptive son in the absence of a natural son, can offer sacrifices and perform religious duties : but such religious efficacy ceases once a natural son is born : hence the adopted son gets a less share. Among Sudras on the other hand no one can offer sacrifices, so his position is not worsened by the birth of a natural son. For the text of *Dattaka Chandrika* *vide* *Stoke's Hindu Law-books*, edition 1865, p. 659. Sir Thomas Strange's *Hindu Law*, Vol. I, p. 99 (edition 1830) lays down that among Sudras the after-born son and the adopted son share equally : the author had been Chief Justice of Madras for years. *Macnaghten's Hindu Law*, p. 70 (edition 1865) says the same thing : at page 66 the author says that the *Dattaka Chandrika* and the *Dattaka Mimamsa* are the two leading authorities on adoption.

Rajah v. Subbaraya ¹ was a case of representation, the adoptive son of one brother claiming against the natural son of another : but the view of *Turner, C. J.* and *Muttusami Aiyar, J.* at p. 254, as to the materiality of this passage of *Dattaka Chandrika*, on the position of Sudras, even though obiter is of the highest importance.

In *Baramanand Mahanti v. Chowdhri Krishnacharan Patnaik* ² *Tottenham and Norris, JJ.* hold that the rule restrict-

1. (1888) I.L.R. 7 Mad., 258.

2. (1884) 14 Cal. L. J. 183.

ing the share of an adoptive son is not applicable to Sudras, and cite Dattaka Chandrika as an authority.

This case was cited with approval in *Asita Mohan Ghosh v. Nirod Mohan Ghosh* ¹ where passages as to the authority of Dattaka Chandrika are collected.

As to the weight to be attached to the Dattaka Chandrika, reference may be made to the following :

Rangama v. Atchama ² *Collector of Madura v. Mutu Ramalinga Sethupathy* ³ *Sri Balusu Gunningasami v. Sri Balusu Ramalakshmanamma* ⁴, *Bhagvan Singh v. Bhagvan Singh* ⁵, *Nagindas Bhugvandas v. Bachoo Hurkisondas* ⁶.

In *Karuturi Gopalan v. Karuturi Venkaraghavaloo* ⁶ sufficient weight has not been given to the Dattaka Chandrika : that case is wrongly decided.

(*Lord Buckmaster* : They do not dispute the Dattaka Chandrika as an authority, but say it is not an authority *ad hoc* : that this is a question of inheritance, as to which the Mitakshara is paramount.)

It is not a question of inheritance only, but of status : the two are bound together. The learned Judges have ignored the time during which the rule of Dattaka Chandrika has been accepted. That rule is not in conflict with the Mitakshara, which does not deal at all with the case of Sudras : rather the Dattaka Chandrika itself assumes and comments on the Mitakshara.

Parikh followed : The general rule is that the adopted son is on the same footing as the natural born. We are not seeking to establish an exception but to limit one. Of the cases relied on in *Karuturi Gopalan v. Karuturi Venkataraghavaloo* ⁷ none is the case of a Sudra : the Bombay case was reversed by this Board in 43 I. A. 56.

De Gruyther K. C. (Edlis with him) for respondents. The Dayabhaga in Bengal and the Mitakshara elsewhere, though originally commentaries, are now the law, and you cannot upset them by saying they conflict with a text of Smṛiti. The Dattaka Chandrika cannot deviate from or add to the Mitakshara. The latter work cites Vasiṣṭha at Chapter I, S. 11, para. 24 : it

1. (1915) 20 Cal. W. N. 901 2. (1846) 4 M. L. A. 1.

3. (1868) 12 M. I. A. 397

4. (1899) L. R. 26 I. A. 113 at p. 131 : 9 M. L. J. 67 · 22 Mad. 398

5. (1899) L. R. 26 I. A. 153. 6. (1915) L. R. 43 I. A. 56.

7. (1915) I. L. R. 40 Mad. 682 at p. 685.

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lays down clearly without any exception that the adopted son takes a fourth only if a legitimate son be afterwards born. (vide Stokes' Hindu Law-Books, p. 420). In this very same chapter Sudras are mentioned at para 41: there is no other special rule of succession provided for them; except for that rule, the ordinary law applied.

There are numerous other works dealing with the subject—Smṛiti Chandrika, Sarasvati Vilasa, Dayabhaga, Viramitrodaya but none of them except Sudras, or gives the rule laid down in Dattaka Chandrika.

The question has arisen out of a text of Gautama, which is never referred to in the Mitakshara, but which is cited in the Dattaka Mimamsa and Dattaka Chandrika. The author of the Dattaka Mimamsa construes it as referring to a virtuous adopted son and a bad natural one: the author of the Dattaka Chandrika applies it to Sudras.

The authority either of the Dattaka Chandrika or of the Dattaka Mimamsa is not high. In *Ganga Sahai v. Lekhray Singh*¹ Mahmood, J. considered himself entitled to refer to other works as to the authority of the Mimamsa, and concluded that very little weight was due to it. The board's view appears from *Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshminamma*². In that case the Board held that the adoption of an only son was good, though the Dattaka Mimamsa and the Dattaka Chandrika had in terms provided that it was bad. They also laid down that the Chandrika was merely a work by a learned man. West and Buhler's disparaging opinion of the Chandrika is at page 131. In *Pattlu Lal v. Parbat Kunwar*³ the definite prohibition by the Dattaka Mimamsa of the adoption by a widow of her brother's son was disregarded. The Board lay down that caution is necessary in adopting Nanda Pandita's glosses. The point is plain, that neither the Mimamsa nor the Chandrika is law *ad hoc*.

The Chandrika arrives at this particular rule, which is quite contrary to the Mitakshara, by arguing from the analogy of the illegitimate son. The text of Vṛiddha Gautama which it cites cannot be traced, and I submit that the view of the Chandrika is based not on any old text, but on the author's view

1. (1886) I L. R. 9 All. 253 at p. 322 2. (1899) L. R. 26 I. A. 113, 129, 131.

3. (1915) L. R. 42 I. A. 155, 161.

that it is unfair that the illegitimate son should get a full share (as he does among Sudras) and the adoptive son only a fourth share.

There is a well grounded tradition that the Dattaka Chandrika was written to support a case of Raja Nobokissen's; as to this *vide* J. C. Ghose's Hindu Law, p. 667, and Golap Chandra Sirkar's Hindu Law of Adoption, p. 124. Sarkar points out that Jagannatha in his Digest never mentions Dattaka Chandrika.

(*Lord Dunedin* : It is important to consider the course of decisions and practice in Madras during the last fifty years).

There has never been any suggestion of practice. The only judicial decision is the dictum in *Raja v. Subbaraya* ¹. The earliest case, *Ayyavu Muppanar v. Nilayathakshi Ammal*. ² was apparently a Sudra case and there are two others, of Sudras, one in Calcutta (4 Cal. 425) and one in Bombay (17 Bom. 100) where Sudras got one-fourth. It cannot be said there is a steady course of authorities even in Madras. Mandlik, West and Buhler, and Siromani all take my view. The Dattaka Chandrika itself states the rule as a deduction as its author's view of what the law should be.

Strange and Macnaghten merely repeat the Dattaka Chandrika.

Dunne, K. C. replied. The Dattaka Chandrika has a precise text dealing with this very situation. The Board has never laid down that the Mitakshara is to supersede the Dattaka Chandrika : and the Mitakshara is in fact silent on this particular matter.

(*Lord Dunedin* : It is not wild assumption that if the law were different in the case of Sudras, the Mitakshara would say so).

The Mitakshara is merely a commentary on Yajnavalkya it must not be taken as the law. The commentator here cites a text of Vasishtha : he does not explain it, nor does he say it is a rule of general application extending to Sudras.

The theory about the Dattaka Chandrika being a forgery was set aside by Banerji, J. in *Bhagvan Singh v. Bhagvan Singh* ³. He had before him all that G. C. Sarkar had said on the subject. His dissenting judgment was upheld by this Board on appeal.

1. (1883) I. L. R. 7 Mad. 253.

2. (1862) 1 Mad. H.C. R 45,

3. (1895) I. L. R. 17 All 294 (F. B) at p. 13.

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The text of Vriddha Gautama cited in the Dattaka Chandrika is also, with the exception of a single letter which is different cited in the Mimamsa : the difference is discussed in *Asita Mohan Ghosh v. Nirod Mohan Ghosh* ¹ where the Calcutta High Court held that the Chandrika's version was correct.

In the cases where Sudras only got a fourth the point that the law was different in the case of Sudras from the other castes was never raised.

Their Lordships' judgment was delivered (May 5, 1921) by

Sir John
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SIR JOHN EDGE :—These appeals raise a question of great and far-reaching importance with regard to the rights of succession in the Presidency of Madras, but this is associated with a series of relatively unimportant matters relating to questions of accounts that have arisen in these circumstances.

The first plaintiff in the suit, who is the first respondent to each appeal, was the manager for many years of a joint family estate which appears greatly to have prospered under his care. Distrust, however, arose, and was apparently well justified, as to his dealing with certain portions of the estate, and elaborate enquiries were set on foot outside the courts for the purpose of ascertaining what the true position was. This first respondent—uneasy, it is asserted, as to the prospect of proceedings being brought against him as the result of these enquiries—instituted proceedings himself, to which the appellants were parties, alleging that they also had been in custody of part of the joint family estate, and asking for accounts and consequential relief, to which demand among other answers, a claim was put forward that the plaintiff should render an account of the joint family properties and his management from 1898 onwards. The questions associated with these claims have been before the Subordinate Judge and before the High Court. Both these Courts refused the claim for the general account and decided the various questions in issue that were raised on the accounts. Apart from the dispute as to the rights of succession, the claim for the general account and the following items only are the subject of these consolidated appeals : First, the appellants say that the plaintiff should pay interest at 9 per cent. on the moneys misapplied in accordance with the direction of the

Subordinate Judge, this direction being overruled by the High Court, who reduced it to 6 per cent. : secondly, they assert that the High Court was wrong in deciding that certain items of Schedule B and Schedule C of the supplemental Schedule B were the joint property of the family : and finally they assert that the High Court was wrong in excluding from the items on which interest was payable a sum of Rs. 7,000, which was the subject of a promissory note held by the plaintiff.

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With regard to the claim for the general account, this has been refused by both Courts. The High Court based their decision upon the ground that all the items in respect of which the plaintiff was alleged to have been guilty of misconduct had been investigated and set out in the schedules which were before the consideration of the learned Judge, who had dealt with them item by item as appeared in his judgment. They continue in these words :—

"What more could be done, even if we direct general accounts, it is difficult to see."

Their Lordships are entirely in agreement with this view. The learned Subordinate Judge himself stated that it appeared that all possible items of collection by the first plaintiff had been proved as far as possible by the indefatigable energy of the defendants 1 and 3. He also added that he thought delay was a good reason for refusing the claim. Their Lordships think that the High Court rightly interpreted the judgment of the Subordinate Judge, and that in substance, if not in actual words, both Courts have decided that in effect the account asked for has already been taken and that it would be a needless prolongation of litigation and waste of cost if a further account were ordered. This conclusion is the one at which their Lordships have themselves arrived, and they therefore think that upon this point the appeal must fail.

With regard to the interest, the matter can be briefly dealt with. The High Court have considered that 6 per cent. simple interest is sufficient. It would require very special and unusual circumstances to induce this Board to vary such a decision, which rests upon discretion, even though in this matter the view of the High Court differed from that of the Subordinate Judge as to the way in which that discretion should be exercised. But they may add that if the matter were one upon

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which an independent judgment was required, they think that the judgment of the High Court was correct.

As to the items claimed by some of the defendants as separate property this depends upon evidence and the Courts have differed as to its effect. Their Lordships think that the judgment of the High Court is correct as to its interpretation. The first defendant asserts that the property was bought with moneys belonging to his wife, and he accounts for these moneys by stating :—

- “My mother-in-law gave property to my wife just before her death. My wife told me of her gift of property to her. I was not present at the time.”

And this is supported by the evidence of the defendant's brother-in-law, whose evidence is in these terms :

- “My sister sold away her husband's properties to which she succeeded. No ; she obtained 4 acres from her husband's family for maintenance. She also purchased 10 acres. Subsequently she sold away all the 14 acres of land.”

The wife was not examined to support the claim. It appears that the learned Subordinate Judge based his judgment upon the view that there was nothing improbable in the defendant's wife having inherited the amount necessary for the purchase of the property. That would be a potent reason if there were substantial evidence to show that such inheritance had in fact been acquired. In their Lordships' opinion such evidence is not forthcoming, and they think upon this point also the judgment of the High Court is correct, though it is liable to be misunderstood from the form of the judgment, which suggests as a reason that the first defendant's story was contradicted by one of his own witnesses whose evidence was inadmissible. This would apparently leave the first defendant's story unchallenged, but in truth his account was never sufficiently substantiated, and for this reason that claim fails.

With regard to the last matter of the Rs. 7,000, it is extremely difficult to extract the reasons why the High Court dealt with this sum differently from other amounts which appear in the same account, though in fact it was added as an additional item. There is however, nothing to show their Lordships that it was so dealt with by the first plaintiff as to render him liable to account for anything more than the actual interest that he received upon it but to this extent he is accountable.

Their Lordships desire once more to repeat the warning they have often given against attempting to apply without

qualification in India the rules applicable to strict accounts between trustees and *cestuis que trusts* that exist in this country, because in truth there are a number of fiduciary relationships in India to which these rules cannot in their entirety apply. This does not mean that breach of established duty should be less severely dealt with in India than in this country, but there are fiduciary relationships which do not involve all the duties which are imposed upon trustees here. The office of manager of a joint family estate affords an illustration of this difference. In the absence of proof of direct misappropriation or fraudulent and improper conversion of the moneys to the personal use of the manager, he is liable to account for what he received and not for what he ought to or might have received if the moneys had been profitably dealt with. Their Lordships cannot find in this case anything to render the first respondent liable beyond the extent to which they have referred. On this point also, except to the extent above mentioned, the appellants fail.

The next question which it is necessary to consider is that which is raised by the second of these two consolidated appeals in which the defendants Arumilli Ramanna and his three sons, Arumilli Ragavudu, Arumilli Venkataratnam and Arumilli Subbarayadu are the appellants, and the plaintiffs are the respondents. The parties are Sudras and belong to a family of Sudras, of the Presidency of Madras, which in general is governed by the law of the Mitakshara. Arumilli Ramanna was, as has been concurrently found by the courts below, adopted by the plaintiff, Subbarayadu, as his son when that plaintiff was childless. Ramanna was by birth a son of Venkiah, who was a brother of that plaintiff. After Ramanna had been adopted that plaintiff's sons, Ramamurti and Periah, who are respectively the second and third plaintiffs, were born, and the question to be considered in the second of these two appeals is whether in the Sudra caste in the Presidency of Madras an adopted son on partition of the family property shares equally with a son of his adoptive father born subsequently to his adoption. The question is an important one, and is by no means an easy one for this Board to decide. The question depends on a text of the Dattaka Chandrika and on the authority to be allowed in the Presidency of Madras to that text.

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So far as ancient text and recognised Sanskrit commentaries on Hindu law are concerned, the earliest authority for the proposition that amongst Sudras an adopted son, on a partition of the property of the joint family, shares equally with a legitimate son of the adoptive father, born subsequently to the adoption, is that of the Dattaka Chandrika. In S. 5 of the Dattaka Chandrika ("Hindu law Books" edited by Whitely Stokes, 1865) which deals with "the succession by inheritance of adopted sons lineally and collaterally," the commentator, after referring to rights of members of a Hindu joint family generally to share in a partition of the family property, said:—

"29. The mode, however, of partition between the son of the wife, the son given, and the rest and the legitimate son, which has been propounded in what preceded, does not apply to the Sudra tribe."

After some further observations, the commentator further said:—

"32. Accordingly, the text subjoined must be construed as referring merely to Sudras. 'A son given being thus adopted, if by any chance, a legitimate son should be born let them be equal partakers of the father's estate.' So also in the following text, the equal participation of all lawfully begotten Sudras having been first propounded, the succession to equal shares of the other sons likewise is subsequently declared by the sentence ('if there be an hundred sons') occurring therein. 'For a Sudra is ordained a wife, of his own class and no other. Those begotten on her shall have equal shares; if there be an hundred sons (the same mode of partition shall obtain).' If the sentence in question be referred to the real legitimate son only, the position contained in it being obtained from what preceded, its repetition would be unmeaning."

For those statements as to the right amongst Sudras of the adopted son to share equally on partition with the subsequently born legitimate son of the adoptive father the author of the Dattaka Chandrika did not state who his authority was. He quoted a text from Vriddha Gautama to the effect that an adopted son and an after-born son share equally, which is not accepted by the Courts in India or by the followers of the Mitakshara or by the followers of the Dayabhaga as a correct statement of the law applicable to all Hindus, and drew his inference that it was applicable to Sudras from texts which do

not propound any such proposition, and, so far as their Lordships understand them, do not suggest the conclusion expressed on this subject by that commentator.

The Dattaka Chandrika has been treated by the Board as a high authority. As early as 1846 Lord Kingsdown, then Mr. Pemberton Leigh, in delivering the judgment of the Board in *Rangama v. Atchama and others* ¹, in reference to the Dattaka Chandrika and the Dattaka Mimamsa, said:—"They are written on the particular subject of adoption; they enjoy, as we understand, the highest reputation throughout India."

In *The Collector of Madura v. Mootoo Ramalinga Selthupathi* ², which was an appeal from the High Court at Madras, Sir James Colville, in delivering the judgment of the Board, referring to the Dattaka Mimamsa and the Dattaka Chandrika, said:—"Again, of the Dattaka Mimamsa of Nanda Pandita, and the Dattaka Chandrika of Davanda Bhatta, two Treatises on the particular subject of adoption, Sir William Macnaghten says that they are respected all over India; but that when they differ the doctrine of the latter is adhered to in Bengal and by the southern Jurists, while the former is held to be the infallible guide in the Province of Mithila and Benares."

It has since then been ascertained that Davanda Bhatta was not the author of the Dattaka Chandrika. Sir James Colville in the passage above quoted, was referring to the authority of the work itself.

In *Sri Balusu Gurulingaswami v. Sri Balusu Ramalakshmanma* ³, which was an appeal from the High Court at Madras, Lord Hobhouse in delivering the judgment of a Board consisting of himself, Lord Macnaghten and Sir Richard Couch said: "The date of the Dattaka Chandrika is not certain; but it is at all events very much later than the Smritis, and it stands only on the footing of a work by a learned man. Messrs. West and Buhler in their valuable work on Hindu law, 3rd-ed., p. 11, speak thus: 'The Dattaka Mimamsa and the Dattaka Chandrika, the latter less than the former, are supplementary authorities on the law of adoption. Their opinions, however, are not considered of so great importance but that they may be set aside on general grounds in case they are opposed to the doctrines of the Vyavahara Mayukha or the Dharmasindhu and Nirṇayasindhu.' This is spoken with special reference to

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1. (1846) 4 Moore, I. A. at p. 97, 2. (1868) 12 Moore, I. A. 397 at p. 437.

3. (1899) L. R. 26 I. A. 113 at p. 131,

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Bombay and Western India. But both works have had a high place in the estimation of Hindu lawyers in all parts of India, and having had the advantage of being translated into English at a comparatively early period, have increased their authority during the British rule. Their Lordships cannot concur with Knox, J., in saying that their authority is open to examination explanation, criticism, adoption, or rejection like any scientific treatises on European jurisprudence. Such treatment would not allow for the effect which long acceptance of written opinions has upon social customs, and it would probably disturb recognised law and settled arrangements. But, so far as saying that caution is required in accepting their glosses where they deviate from or add to the Smritis, their Lordships are prepared to concur with the learned Judge."

In *Bhagwan Singh v. Bhagwan Singh* ¹, which was an appeal from the High Court at Allahabad, Lord Hobhouse in delivering the Judgment of a Board consisting of himself, Lord Macnaghten, Lord Morris and Sir Richard Couch, in referring to the Dattaka Mimamsa and the Dattaka Chandrika said: "If there were anything to show that in the Benares School of Law these works had been excluded or rejected, that would have to be considered. But their authority has been affirmed as part of the general Hindu law, founded on Smritis as the source from whence all Schools of Hindu Law derive their precepts. In Doctor Jolly's Tagore Lecture of 1883, that learned writer says: The Dattaka Mimamsa and Dattaka Chandrika have furnished almost exclusively the scanty basis on which the modern law of adoption has been based.' Both works have been received in courts of law including this Board, as high authority. Lord Kingsdown's words in *Rangama v. Atchama* ² have already been quoted and those of Sir James Colvile in *The Ramnad case* ³. As has been said, Sir James Colvile quotes with assent the opinion of Sir William Macnaghten, that both works are respected all over India, that when they differ the Chandrika is adhered to in Bengal and by the Southern Jurists while the Mimamsa is held to be an infallible guide in the Provinces of Mithila and Benares. To call it infallible is too strong an expression, and the estimates of Sutherland, and of West and

1. (1899) 26 I. A. 153, at p. 161, 2 (1846) 4 Moore I. A. at p. 97.

3. (1868) 12 M. I. A. 397.

Buhler, seem nearer the true mark ; but it is clear that both works must be accepted as bearing high authority for so long a time that they have become embedded in the general law."

There can be no doubt that the Dattaka Chandrika has been for long and still is accepted in the Presidency of Madras as a treatise on adoption of the highest authority. It is not primarily a work dealing with rights of inheritance or with rights of coparcenary in property acquired by birth or adoption, but it does necessarily deal with such subjects as the occasion requires. It is not known who was the author of the Dattaka Chandrika, and the doubt as to its authorship makes it impossible to fix with any certainty the date when it was written, but it is believed to be an earlier work than the Dattaka Mimamsa, which was written by Nanda Pandita, who is known to have lived about 300 years ago. When the Dattaka Chandrika was first accepted in Southern India as an authority on the law of adoption, it would probably be impossible now to ascertain. It, however, appears to their Lordships that it does not necessarily follow from the fact that the Dattaka Chandrika has been long accepted in Southern India as a high authority on the law of adoption that comments and propositions, apparently then novel contained in it, if not based upon ancient texts which can with some certainty be identified, have been accepted by the Hindus of Southern India as part of the Hindu Law. It thus becomes necessary to ascertain, if possible, whether the rule propounded for the first time, it is believed, in paragraphs 29 and 32 of S. 5 of the Dattaka Chandrika, which have been quoted above, ever was accepted and acted upon by the Hindus of the Presidency of Madras as Hindu Law.

Mr. W. Macnaghten in his "Principles and Precedents of Hindu Law," which was published at Calcutta in 1829 and is a recognised authority on Hindu law, said at p. 70 of Volume 1: "Where a legitimate son is born subsequently to the adoption, he and the son adopted inherit together, but the adopted son takes one-third, according to the law of Bengal, and one-fourth, according to the doctrine of other Schools." In a note to that passage, Macnaghten stated: "It is laid down in the *Dattaka Chandrika* that in the case of *Sudras*, if a legitimate son be subsequently born, he is entitled to an equal share only with the adopted son, and this rule prevails accordingly in the Southern Provinces."

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It has been suggested, in reference to his note which has been quoted, that Mr. William Macnaghten, when he wrote his book, had no special knowledge of the law affecting Sudras in the Presidency of Madras but even if that suggestion is well founded, it cannot be suggested that Sir Thomas Strange, when he wrote his well-known book on Hindu Law which was published in 1838, did not know what was the then accepted law in the Presidency of Madras, as to the rights of an adopted son amongst Sudras. Sir Thomas Strange had been Chief Justice of Nova Scotia; he commenced his judicial experience in India in 1798, when he was appointed Recorder of Madras, and became a celebrated Indian jurist. He was Chief Justice of the Supreme Court at Madras from 1800 until 1817. At page 99 of Volume I of his 'Hindu Law' in reference to the right of inheriting on the death of a Hindu father, Sir Thomas Strange stated:—"Among Sudras, in the same event (the death of the father), the after-born son and the adopted son share equally the paternal estate." That statement was doubtless based on the text of the Dattaka Chandrika which has been quoted. Sir Thomas Strange knew that according to Hindu Law as applicable to the twice-born classes, the share to which an adopted son would be entitled on partition would be less than the share of the legitimate son born to the adoptive father subsequently to the adoption, and he would not have stated that amongst Sudras those sons would take equal shares if from his judicial experience in Madras he had any doubt that the rule propounded in the Dattaka Chandrika had not been accepted and acted upon in the Presidency of Madras.

The earliest reported case in the Presidency of Madras so far as their Lordships are aware, in which this question as to the right amongst Sudras of the adopted son to share equally in the property of a joint family with the subsequently born legitimate son of the adoptive father was mentioned, came on appeal before the High Court at Madras in 1883. In that case (*Raja and another v. Subbaraya*¹), the plaintiff sued for partition and to recover from the defendant one-half of certain moveable and immoveable properties on the ground that he was an adopted son of the deceased undivided brother of the deceased father of the defendant. The parties were Sudras, and the defendant contended that the plaintiff was entitled to one-

1. (1883) 1 L R, 7 Mad. 253.

fifth only of the estate, and that he, the defendant was entitled to four-fifths under the Hindu law. In that case Turner, C. J. and Muttuswami Ayyar, J., on appeal, delivered the following judgment:—

“There is no valid ground for the contention that if the adoption be proved the plaintiff should take but a fifth share. By representation the adopted son takes the share which his adoptive father would be entitled to take on partition. With all deference to the authority of the High Court of Calcutta in *Raghubanund Doss v. Sadhu Churn Doss*¹ we doubt whether the passage in Dattaka Chandrika, S. 5, paragraph 25, even with the addition suggested has been correctly interpreted. If there be such a special rule, as is suggested, it is not applicable at all events to Sudras among whom the adopted son is declared entitled to take an equal share with a legitimate son who is born subsequently to the adoption. We agree with the Judge that the plaintiff would take his father's share, a moiety, if he were really adopted.”

It has been objected, and correctly, that the dictum in that case that amongst Sudras an adopted son is entitled to take an equal share on partition with a legitimate son born subsequently to the adoption, was not necessary to the decision of the appeal then before the Madras Court, and that the opinion on that subject expressed by Turner, C.J., and Muttuswami Ayyar, J., must be regarded as *obiter*. Nevertheless it was the opinion of the then Chief Justice of Madras, who was an able and careful lawyer and of Mr. Justice Muttuswami Ayyar, who was a member of a Brahmin family of the Madras Presidency, and who earned for himself the well-deserved reputation of being one of the most accomplished and reliable lawyers in India in cases involving a knowledge of Hindu law. That opinion of those learned judges, although strictly it was an *obiter dictum*, was deserving of respect, and was probably expressed in answer to some argument of counsel in the case. If the rule propounded in the Dattaka Chandrika that amongst Sudras the adopted son and the subsequently born legitimate son shared equally had been seriously questioned in the Presidency of Madras, it is impossible to believe that Mr. Justice Muttuswami Ayyar should in 1883 not have been aware that the rule had not been accepted and acted upon in that Presidency as correct.

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¹. (1878) 1. L. R. 4 C. 428.

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The next reported case relating to Sudras in the Madras Presidency, of which their Lordships are aware in which the rule in question here of the Dattaka Chandrika was considered, is that of *Karuturi Gopalam v. Karuturi Venkata-raghavulu* ¹ which came on appeal before the High Court at Madras in 1915. In that case the parties were Sudras, and the plaintiff, who was the respondent to the appeal, had been adopted in 1898 by one Venkanna, a Sudra, who died in 1902 leaving him surviving the plaintiff, the first defendant, who was the legitimate son of Venkanna, born to him subsequently to the adoption of the plaintiff, and his widow, who was the natural mother of the first defendant, and was the second defendant. During the minority of the plaintiff and the first defendant, the widow managed the estate. The plaintiff attained majority in 1907, and brought the suit in 1910 for partition and delivery to him of half of the family estate, alleged mismanagement of the estate by the widow and misappropriation by her of portions of the estate for the benefit of the first defendant, and claimed an account. The first defendant, through his mother as his guardian, pleaded, amongst other things which are not material to the question to be considered here, that the plaintiff, as an adopted son, was entitled only to a fifth share of the estate, and that he, the first defendant, was entitled to the remaining four-fifths. The suit was tried by A. Sambamurti Ayyar, a Hindu, the then Subordinate Judge of Rajahmundry who decreed to the plaintiff a half share in all the family properties, and finding that there had been malversation of the estate by the second defendant for the benefit of the first defendant, made a decree for restitution.

It is to be observed that the learned Hindu Subordinate Judge, who tried that suit in or after 1911, must have believed that in the Presidency of Madras the rule of the Dattaka Chandrika, that amongst Sudras an adopted son was entitled to share equally on a partition with the subsequently born legitimate son of the adoptive father, was the rule to be applied in the Presidency of Madras in cases in which the parties were Sudras. The appeal from that decree of the Subordinate Judge of Rajahmundry came before Wallis, C. J., and Seshagiri Ayyar, J. Seshagiri Iyer, J. wrote the judgment, with which Wallis, C. J., concurred. The learned Judges of the High Court held

1. (1915) I. L. R. 40 Mad 632, 29, M. L. J. 710.

that they were not bound by the opinion on the question of the right amongst Sudras of an adopted son to share equally with the subsequently born son of the adoptive father in the property of the joint family which had been expressed by Turner, C. J., and Muttuswami Ayyar J. in *Raja v. Subbaraya* ¹ on the ground that the opinion was *obiter* and on the ground that the attention of those learned Judges had not been drawn to the case of *Ayyaru Muppanar v. Nilayadatchi Ammal*,² and having considered some ancient texts and the Mitakshara came to the conclusion that the rule propounded on this subject in the Dattaka Chandrika was not binding upon them and that the dictum based on the authority of the Dattaka Chandrika should not be followed.

As the reference in the judgment of Seshagiri Ayyar, J., in *Karuturi Gopalam v. Karuturi Venkataraghavulu* ³ to the decision in *Ayyaru Muppanar v. Nilayadatchi Ammal* ² suggests that if that decision had been brought, in 1883, to the attention of Turner, C. J., and Muttuswami Iyyar, J., in *Raja v. Subbaraya* they would not have expressed the opinion that amongst Sudras the adopted son is entitled to take an equal share with a legitimate son who is born subsequently to the adoption, it is necessary to consider that case. The case of *Ayyaru Muppanar v. Nilyadatchi Ammal* ², came on appeal to the High Court at Madras in 1862.

The parties to the suit were Hindus, but it does not appear whether the parties were Sudras ; all that is stated is that " the parties were of a class not strictly bound by the requirements of the Hindu law." Probably they were Sudras. The plaintiff had brought his suit for one-fourth of the estate of Ayyaru Muppanar, deceased ; the defendant, a minor appearing through his mother as guardian, was a son of Ayyaru Muppanar, born after the adoption. The main questions considered were whether the adoption had in fact been made; whether if made it was a valid adoption ; whether a son, adopted or begotten, could claim maintenance until put in possession of his share of the ancestral estate ; and whether as against an adopted son suing for his share of the ancestral estate the law of limitation does not begin to run until the allotment of such share has been demanded and refused. The question as to whether the adopted son was

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1, (1883) I. L. R. 7, Mad. 253. 2 (1863) 1 Mad. H. C. R. 45.

3. (1915) I. L. R. 40 Mad. 632: 29 M. L. J. 710

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entitled to more than one-fourth share does not appear to have been raised or considered. Strange and Frere, JJ., considered Chapter I, Section XI, paragraph 24, of the Mitakshara and decided that the estate should be divided into five portions of which the begotten son should have four and the adopted son one. The Dattaka Chandrika was not so far as appears alluded to. Even if it be assumed that the parties were Sudras their Lordships are unable to regard that case as an authority on the question which was before the High Court at Madras in *Karuturi Gopalam v. Karuturi Venkataraghavulu*,¹ and which has to be considered in this appeal.

In the present case, the subject of this appeal, the suit was brought in the District Court of Godavari on the 26th November, 1909 ; it was transferred to the Court of the Subordinate Judge of Rajahmundry. The Subordinate Judge who tried the suit was A. Sambamurti Ayyar, and he delivered his judgment in it on the 13th December, 1913. There were six issues framed, but the material question so far as the second of these appeals is concerned relates to the share to which the adopted son and through him his sons were entitled on partition of the family property. The plaintiffs were Arumilli Subbarayadu and his two minor naturally-born sons. The defendants 1, 2, and 3 were sons of Venkiah who had been the only brother of the plaintiff Arumilli Subbarayadu ; defendant 5 was a son to defendant 1 ; defendant 6 was a son of defendant 2 ; defendant 4, was the adopted son of the plaintiff Arumilli Subbarayadu, but was described in the plaint as a son of Venkiah, and defendants 7, 8 and 9 were the minor sons of defendant 4. The other defendants are immaterial so far as the second of these two consolidated appeals is concerned. In the plaint the adoption by the plaintiff Arumilli Subbarayadu of Arumilli Ramanna, defendant 4, was ignored, and it was alleged in the plaint that the "plaintiffs are entitled to a half-share in the entire family property and the defendants 1 to 9 are entitled to a half-share." In the written statement of the defendants 1, 2, 3, 5 and 6 it was alleged that the plaintiff Arumilli Subbarayadu had adopted the defendant 4. A. Ramanna, as his son in 1896. In the written statement of the defendants 4, 7, 8 and 9, who are the appellants in the second of these consolidated

1. (1915) I L R 40 Mad. 652. 29 M. L. J 710.

appeals, it was alleged that the plaintiff Arumilli Subbarayadu had adopted the defendant 4, Arumilli Ramanna, in 1896 and that as an adopted son he was entitled to an equal share along with the plaintiffs.

The fact and the validity of the adoption were disputed, but the Subordinate Judge, on the clearest evidence, found that the adoption was proved and was valid, and having so found that issue he in the thirtieth paragraph of his judgment recorded his finding as to the share in the family property which the defendant 4 as an adopted son in the Sudra family was entitled to, thus :—

“30. As regards the share to which the fourth defendant should be entitled according to law, there is practically no dispute. The parties belong to the Sudra caste and the law is clear that amongst the Sudras the adopted son shares equally with the subsequent born Aurasas sons (see I L. R., VII Madras, p. 253 and XVIII Madras, pp. 422 and 435). Thus, the first plaintiff's branch consisting of plaintiffs 1 to 3 and the fourth defendant will have to divide amongst themselves a half share of the family property and the fourth defendant's share therein would, therefore, be one-eighth of the whole property. This is my finding on issue I (a).”

It may be mentioned that Their Lordships have been unable to ascertain what was the case which the Subordinate Judge referred to as reported in “XVIII Madras, pp. 422 and 435.” That judgment of the Subordinate Judge was delivered on the 13th December, 1913, and it is to be noticed that up to that date the plaintiffs do not appear to have contended that amongst Sudras an adopted son was not entitled to share on partition of the family property equally with the legitimate sons of the adoptive father born subsequently to the adoption. They apparently raised that point for the first time in their memorandum of appeal to the High Court on the 24th March, 1914. The judgment of the High Court appears to have been delivered on the 13th October, 1916. Their Lordships do not know when the appeal to the High Court in *Karuturi Gopalam v. Karuturi Venkataraghavulu*¹ was presented, but the appeal to the High Court in that case was heard in August and September, 1915. That was an appeal from a decree of the same Subordinate Judge.

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¹ (1915) I. L. R. 40 Mad. 632, 22, M. L. J 710.

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The learned Judges, Ayling and Srinivasa Aiyangar, JJ., who heard the appeal to the High Court in this present suit, briefly dealt with the rights of an adopted son amongst Sudras as follows :—

“ As to the share of the adopted son, it has been decided now that the fact of the adopted son being a Sudra does not give him an equal share with the natural-born sons. (*Karuturi Gopalam v. Karuturi Venkataraghavulu*, ¹). The dictum in *Raja v. Subbaraya*, ² which has been followed by the lower Court has been disapproved in that case. . . . The fourth defendant's share will therefore, be altered to one-thirteenth of one half of the family property.”

From the decree of these learned Judges this appeal has been brought.

The inference which their Lordships draw from the materials before them is that the rule of the Dattaka Chandrika that on a partition of the joint family property of a Sudra family an adopted son is entitled to share equally with the legitimate son born to the adoptive father subsequently to the adoption had been accepted and acted upon for at least more than a century in the Presidency of Madras, as the law applicable in such cases to Sudras until the law on that subject was disturbed in 1915 by the decision of the High Court at Madras in *Karuturi Gopalam v. Karuturi Venkataraghavulu*. ¹ It also appears to their Lordships that that rule of the Dattaka Chandrika, although not supported by any ancient text of the Smritis or by the Mitakshara, is not inconsistent so far as Sudras are concerned with the Smritis or the Mitakshara.

What has been said in the preceding paragraph is sufficient to dispose of the second of these consolidated appeals from the High Court at Madras, but as the Dattaka Chandrika is considered in Bengal as a high authority it will be satisfactory to consider what view has been expressed by the High Court at Calcutta about the rule of the Dattaka Chandrika as to the right of an adopted son in a Sudra family to share equally on a partition of the joint family property with a legitimate son of the adoptive father born subsequently to the adoption. The latest case of which their Lordships are aware in which the subject was discussed in the High Court at Calcutta was that of *Asita Mohan*

1. (1915) I L R. 40 Mad. 632, 29 M L J. 710

2 (1883) I. L R, 7, M 253.

Ghosh Mullik v. Nirode Mohan Ghosh Mulick ¹ which came on appeal before Chaudhuri and Newbould, JJ., from a decree of the 30th March, 1912, of Babu Kunja Behary Gupta, Additional Subordinate Judge of Birbhum, who, having found that the parties were Sudras, held that the adopted son was entitled to share equally with the after-born natural son. The learned Judges of the High Court say: "Clear authority for the proposition (the right of a Sudra's adopted son to share equally with the after-born legitimate son) is to be found in the Dattaka Chandrika (see V, Ss. 29 to 32). The Dattaka Chandrika is a work of undoubted authority in Bengal . . . In *Baramannud Mahunt v. Krishna Charan Patnaik* ² a Bench of this Court accepted the law as laid down in the Dattaka Chandrika on this point . . . There are no other decided cases exactly on the point (in the High Court at Calcutta). We feel bound to attach great weight to the fact that those decisions have remained unchallenged for over thirty years." The learned Judges then considered some texts of Manu, Yajnavalkya and the Mitakshara, and some other commentaries and concluded as follows: "Having regard to the above we cannot say that the Dattaka Chandrika has in any way deviated from the Smritis." The judgment is a long one as it also dealt with several other matters which do not affect the question here.

The result is that interest actually received on the sum of Rs. 7,000 must be allowed, and to this extent the decree must be varied, but subject thereto the first appeal must be dismissed. The slight alteration does not deprive the respondents, who appeared, of their right to the costs.

The second appeal (No. 19 of 1919) must be allowed. The decree of the High Court must be set aside with costs so far as it varied the declaration in the decree of the Court of the Subordinate Judge as to the shares to which the parties are entitled, which last-mentioned decree must to that extent be affirmed and restored.

The appellants in the first appeal will pay the costs of the first three respondents who alone appeared, and the respondents in the second appeal will pay the appellants' costs of that appeal.

Their Lordships will humbly advise His Majesty accordingly.

1. (1916) I.L.R. 20 C. W. N. 401

2. (1884) I.L.R. 14 Cal. L. J. 183.

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Solicitor for appellants : *E. Dalgado.*

Solicitor for respondents : *Douglas Grant.*

A. P. P.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT: MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE
COUTTS TROTTER.

Appia K. R. Rukmani Ammal . . . *Appellant in A. A. A. O.
No. 25 of 1920 (Petitioners).**

Appia Ramachari and another . . . *Appellants in A. A. A. O.
No. 26 of 1920 (Petitioners).*

Kuttuvava Narasimma Iyer
and another . . . *Respondents in both the
appeals (Respondents-
Plaintiffs.)*

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Ammal
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Iyer.

Mortgage—Prior and subsequent mortgagees—Suit by each impleading other—Decrees in, and sales in execution—Purchaser's rights—First purchaser—Right of—Conflict between two decrees—Effect—C. P. C.—O 21, R 100—Application under—Order on—Appeal from—Application falling under S. 47—Effect—Procedure.

In a suit by a prior mortgagee, A, against the mortgagor and a subsequent mortgagee (B), a decree for sale was passed in July 1907 with the consent of A subject to the subsequent mortgage right of B. In execution of that decree the mortgaged properties were sold and purchased by A himself on 8-11-1909. A obtained delivery of the properties in March 1920.

Subsequent to the date of the decree in A's favour, B brought a suit on his mortgage against the mortgagor and A in which the latter claimed priority over B's mortgage. A decree was passed in that suit on 23-8-10 directing the plaint property to be sold "subject to the priority of A to the extent of the amount declared due to him under his decree." In 1916 the final decree in the suit was passed and the mortgaged properties were again sold in execution thereof and purchased by B himself in October 1917. On 5-2-19 B got delivery of the properties dispossessing A. On an application by A under Or 21, R 100, C. P. C. for restoration of possession, *held* that he was not entitled to possession as against B.

Per Sadasiva Aiyar, J.—If A was not bound by B's decree and B by A's, A's first purchase would give him the right to possession against B. But each having been impleaded in the other's suit, both are bound by both decrees; and, on the principle that, where the rights obtained under two decrees are in conflict with each other, the rights under the latter decree must prevail, A was bound by the decree in favour of B.

Per Coutts Trotter, J.—The matter arising out of an application in execution, the only question before the Court is as to the construction of the decree sought to be executed, that in B's favour. Under the equity of redemption passed to B, subject to the rights of A, as mortgagee

Sadasiva Aiyar and Counts Trotter, JJ —Where an application under O. 21, R. 100 is fought out between persons who were parties to the suit or their representatives, the application falls under S. 47 C. P. C., the order thereon is a decree within the definition of S. 2 Cl. (2), and an appeal lies therefrom.

In a matter of procedure it is advisable to follow the preponderance of authority in this Court.

Appeals against Appellate orders preferred against the decrees of the District Court of Madura dated 27th October 1919 in Appeal Suits Nos. 249 and 250 of 1919, preferred against the orders of the Court of the Principal District Munsiff of Madura in Execution Applications Nos. 103 and 104 of 1919, respectively in O. S. No. 343 of 1909.

A. Narayanaswami Aiyar for Appellants.

K. V. Krishnaswami Aiyar and *N. Swaminatha Aiyar* for Respondents.

The Court delivered the following :—

Judgments :—*Sadasiva Aiyar, J.* :—This is an appeal against the order of the District Judge of Madura who in reversal of the order of the Principal District Munsiff of Madura directed possession of certain properties to the respondents.

The facts are a little complicated and the material ones have to be stated to understand the questions in dispute. In stating them I shall sometimes identify the parties with their predecessors in title in order to avoid unnecessary and confusing details. The appellants in C.M.S.A. 25 and 26 were the petitioners in the Munsiff's Court. As mortgagee, their vendor (predecessor in title) obtained the first decree for sale of the plant properties in a suit brought against the mortgagor and against the respondents (2nd mortgagees). Either by carelessness or deliberately in order to obtain a speedy decree for sale, he agreed to a decree for sale subject to the subsequent mortgage right of the respondents. This decree was passed in July 1907.

The respondents then brought O. S. No. 343 of 1909 against the common mortgagors and against the vendor of petitioners (as if he was a subsequent mortgagee a position which he consented to occupy in the proceedings in the prior suit). After this suit of 1909 was brought, the petitioners' vendor brought the mortgaged properties to sale in execution of his first decree and purchased them himself on 8-11-1909. Then he filed a written statement in the respondents' suit claiming priority over respondents' mortgage. While that suit was pend-

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ing he got delivery of the properties which he purchased in his first suit in March 1910.

The respondents' second suit was decreed on 23-8-1910 and that decree directed the plaintiff property to be sold "subject to the priority" of the petitioner's vendor "to the extent of the amount declared due" to her in her prior decree of 1907. In accordance with this preliminary decree of August 1910 a final decree was passed in 1916, the properties were again sold in the second suit of the respondents and they were purchased by the respondents in October 1917.

I have already said that the petitioner's vendor as purchaser in his first suit obtained delivery through court in March 1910 ejecting the common mortgagors. The respondents as purchasers in 1917 in their second suit applied for delivery and got delivery on 5-2-1919 dispossessing the petitioners. It was under these circumstances that the petitioners filed their applications in the Munsif's Court out of which the second appeals have arisen. The applications were filed under O. 21, R. 100 for restoration of possession (as I stated in the beginning I have identified the vendor of the petitioners whose names are Appiah K. R. Rukmani Ammal, A. Ramachari and A. Rajaram with his predecessor in title including Venkatachala Aiyar who was the first mortgagee of 1894, his title being traced through several transfers by alienations, inheritance etc. So also with the Respondents.)

The District Munsiff granted the petitioners' applications and restored them to possession on the ground that their vendor's court purchase in November 1909 was prior to respondents' court purchase of 1917 and that the respondents' decree of August 1910 directed sale of the property subject to the petitioners' vendors' claim of priority. On appeal by the respondents, the Lower Appellate Court re-restored possession to the respondents. Though the judgment of the lower appellate court contains several paragraphs, the reason for the decision may be said to be given only in one short sentence as follows:—"The subsequent mortgagees the present appellants (that is the, appellants before the District Court who are the respondents in this Court and were the respondents in the Munsif's Court)" had a right to redeem the first mortgagee and they have therefore a right to possession in pursuance of their purchase in execution." The

contentions formulated in the 15 grounds of the Memorandum of Appeal to this Court may be boiled down to these three namely, (1) No appeal lay to the District Judge from the order of the District Munsif as the order was passed by the District Munsif on an application under O. 21, R. 100 and as O. 21, R. 103 makes the District Munsif's order final subject only to the result of a suit by the defeated party; (2) The petitioners' appellants' decree for sale and purchase being earlier, they were entitled to possession against the respondents; (3) At any rate, the lower appellate court ought to have granted possession to the respondents only on condition that they paid the amount due under the petitioners' first decree.

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If the appellants' first contention that no appeal lay to the District Judge is correct, then their second appeals to this Court in a matter in which there is not even a first appeal are, of course still more incompetent and they ought to have put in revision petitions against the District Judge's order on the ground that it was passed by him without jurisdiction. However as we have power to convert a Memorandum of Appeal into a Revision Petition in a suitable case, I am not inclined to dispose of these second appeals on a mere technical ground. The question whether an appeal lay to the District Court should, no doubt, be answered in the negative if the petitioners applications to the District Munsiff fell only under O. 21 R. 100 having regard to the provisions of O. 21, R. 103. But it is contended by the respondents that the applications fell also under S. 47 (old S. 244) that the common order was therefore a decree within the definition of decree in S. 2 cl. 2 and that appeals consequently lay under S. 96 (1) to the District Court from that order. Much may be said and much has been said in support of both sides on the question whether an appeal does or does not lie where an application under O. 21, R. 100 was fought out between persons who were parties to the suit or the representatives of the parties to the suit. *Veyindramuthu Pillai v. Maya Nadan*¹ and *Meyyappa Chetti v. Chidambara Chetty*² support the respondents' contention that an appeal lies in such cases. *Dipru v. Hari suds Shet*³ and the decision of Oldfield and Bakewell, JJ. in A. A.O. No. 118 of 1916 support the appellants' contention. I think in a matter of procedure,

¹ 1 (1919) I. L. R. 39 M. L. J. 456

² (1919) I. L. R. 39 M. L. J. 603

³ (1917) I. L. R. 42 Bom. 10

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it is advisable to follow the preponderance of authority in this Court, especially as Oldfield, J. who was himself a party to the decision in A. A. O. No. 118 of 1916 afterwards (*in Meyappa Chetty v. Chidambara Chetty* ¹ at page 607) treated that decision as of "doubtful correctness". This disposes of the first contention of the side of the appellants.

We next come to the 2nd contention of the appellants, namely, that as first purchasers of the rights of the mortgagor, the petitioners—Appellants are entitled to possession. That would be so according to the authorities if their predecessor in title was not a party to the respondents' subsequent mortgage suit. As pointed out by my learned brother in the case in *Chinnu Pillai v. Venkatasamy Chettiar* ² (decided by my learned brother and Srinivasa, Aiyangar, JJ.) "what passes to a mortgagee is the right to sell the mortgagor's interest as it stood at the date of the mortgage, subject only to this; that in his suit he must make all subsequent mortgagees parties if he wishes the sale to be free of their encumbrances. The other principle is that of any number of mortgagees, the later can always redeem the earlier, but cannot be compelled to do so, and the earlier cannot redeem the later except by consent". Now the petitioners' vendor purchased in November 1909 the mortgagor's right to possession as it stood in 1894, (the date of his mortgage) and hence he became in November 1909 the owner of the property. Afterwards he was made a party to the respondents' suit of 1910, the respondents' suit being based upon their mortgage of 1897, and the respondents got their decree for sale which, of course included the right of the mortgagors as it stood in 1897 and therefore included the right to possession of the land. The result is that the petitioners' vendor first obtained in 1909 the right to possession as purchaser of the mortgagor's right to possession. The respondents then obtained the same right to possession in 1917. If the petitioners' vendor is not bound by the respondents' decree, nor the respondents by the petitioners' vendors' decree, then the petitioners' vendor's first purchase would give him the right to possession against the respondents. But each side having been impleaded in the other side's suit, both sides are bound by both the decrees. But where the rights obtained under two decrees both binding on both sides are in conflict with each other, the rights under the later

1. (1919) I. L. R. 39 M. L. J. 603 2. (1915) I. L. R. 40 Mad. 77 : 30 M. L. J. 347.

decree must prevail. This follows from general principles of jurisprudence : and I need refer only to *Moturi Seshayya v. Sri Rajah Venkatadri Appa Row*¹ decided by Ayling and Srinivasa Aiyangar, JJ, the head note of which is as follows : "In cases of judgments inter parties, the later adjudication should be taken as superseding the earlier whether or not the earlier adjudication was pleaded as a bar to the trial of the suit in which the later adjudication was made". Hence the second contention also fails.

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An regards the 3rd contention, the learned Vakil for the respondents intimated that his clients were prepared to pay the amount declared due to the petitioner under the decree in O. S. No. 276 of 1906 into Court at any time. I think that Justice and principle require that lower appellate court's decree ought to be modified as follows :—

Add to the first paragraph of the decrees of the Lower Appellate Court in A. S. No. 249 of 1919 after the word "certificate" the words "but subject to the appellants in the District Court (Kuttuva Narasimhiah and Kuttuva Kasturi Ranga Aiyar) paying to the petitioner (Rukmani Ammal) half the amount due under the decree in O. S. No. 278 of 1906 within 1st July 1921 the amount so due being also inserted at the end of the decree". A similar addition will be made to the decree in A. S. No. 250 of 1919. There will also be a clause before the heading "Appellants' costs" to the effect that in default of payment of the amount, declared to be due on the 1st July 1921 within that date the appeal to the District Court shall stand dismissed with costs.

As regards the costs in this court I would direct the parties to bear their respective costs.

Coutts Trotter, J. :—On the first point, I agree with my Lord that in matters of procedure it is most advisable that the preponderance of authority in this court should be followed, even supposing that if the matter were *res integra* one might come to a different conclusion. I therefore adopt the doctrine of *Veyindramuthu Pillai v. Maya Nadan*² and *Meyyappa Chetty v. Chidambaram Chetty*³ that R. 103 of O. 21 only applies to cases where strangers to the decree or involved, and that S. 47 of the Civil Procedure Code governs cases where those concerned are parties to the suit or representatives of parties. On that

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1. (1916) 31 M. L. J. 219.

2. (1919) 39 M. L. J. 456.

3. (1919) 39 M. L. J. 608.

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view, an appeal lay, and was rightly entertained. The result is certainly logical, though I cannot bring myself to believe that the draftsman of O. 21 R. 103 meant to give both an appeal and a substantive right of suit to the defeated party. But I yield to the consideration that in matters of procedure, consistency is the all-important thing to keep in view.

On the merits also, I agree with my Lord, though on some what different grounds. This is an application in execution: and I conceive that all we are called upon or entitled to do is to construe the actual decree that is before us. It may be that the result would be the same if we had to consider both decrees together, and if my conclusions in *Chinnu Pillai v. Venkatasami Chettiar*¹ are sound, it would seem that the respondents case here is well founded. But I prefer to rest my decision on the narrower ground that we are only concerned with the second decree, that in O. S. No. 343 of 1909. That decree ordered the sale of the property subject to the amount due to the respondent under the decree, in O. S. No. 276 of 1906. The only possible construction of the decree in O. S. No. 343 of 1909 is that the equity of redemption passed to the purchaser in that sale, *i. e.*, the respondent, subject to the rights of the appellant as mortgagee.

I agree that the appeals should be dismissed.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE RAMESAM.

Ramakrishna Pillai

.. *Petitioner.* (*Petitioner Defendant*).

v.

S. A. Balakrishna Aiyar and another ...

Respondents.

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Civil Rules of Practice (Madras) R 277—Applicability—“any matter connected therewith”—Meaning—High Court Circular 679 of 1869—Applicability—Proviso to R. 277—Scope of—Criminal proceedings relating to possession if within proviso

The words “or in any matter connected therewith” in R. 277 of the Civil Rules of Practice include a subsequent suit if it is connected with the earlier one, and two suits will ordinarily be considered connected if they have any issue in common or involve substantially a determination of the same question of fact or the same mixed question of law and fact.

Per *Spencer, J.*—High Court Circular 679 of 1869 does not apply to cases in which the same parties oppose each other in successive suits. If it purported to

¹C. R. P. 687 of 1920.

lay down anything contrary to the rule itself we should decline to be guided by it.
 Per *Ramesam, J.*—The Proviso to R. 277 must be confined to Civil cases and cannot be availed of by a pleader merely because he has not been engaged in Criminal proceedings relating to possession only.

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Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order and judgment of the Court of the Subordinate Judge of Mayavaram in O. P. No. 36 of 1920 in O. S. No. 56 of 1920.

T. R. Ramachandra Aiyar and *T. V. Gopalaswami Mudaliar* for Petitioners.

T. R. Venkatarama Sastri and *K. Bhashyam Aiyangar* for Respondents.

The Court delivered the following

Judgments : *Spencer, J.*—The petitioner is at the same time the plaintiff in O. S. No. 8 of 1917 on the file of the Subordinate Judge's court of Mayavaram and the defendant in O. S. No. 56 of 1920 on the file of the same Court, and the respondents are two vakils practising in that court. The question we have to decide is whether the respondents can, consistently with R. 277 of the Civil Rules of Practice, appear against the petitioner in the latter suit having already acted for him in the earlier suit. We are informed that both suits are still undisposed of.

Spencer, J

The rule declares that a pleader who has advised a party in connection with the institution of a suit, or has drawn pleadings in connection with any such matter, or has acted for him shall not appear in such suit or in any appeal or application for revision arising therefrom, or in any *matter connected therewith* for any person whose interest is opposed to that of his former client. It is only where a pleader obtains the consent of the former client or the special leave of the court that an exception to this rule is provided. But it is always open to the pleader to give his former client an opportunity of engaging his services, and if the latter declines to engage him, he may then accept an engagement from his adversary.

The lower court dismissed the petitioner's application that audience should be refused to the two vakil respondents who have filed O. S. No. 56 of 1920 for the plaintiff in that suit against the petitioner. The subordinate Judge's main reasons for his order appear to be that he was not then satisfied that there would be any conflict between their duty in representing the plaintiff in O. S. No. 8 of 1917 and in representing his

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opponent in O. S. No. 56 of 1920. It was argued before him that the contentions that the respondents would as vakils have to put forward in the one suit would not necessarily be inconsistent with their contentions in the other.

We are now in possession of the written statements and the issues in both suits and it seems to me impossible for the respondents to maintain that in supporting the plaintiff on issues 1 and 4 in O. S. No. 56 of 1920 they would not have to take up a position inconsistent with that which forms the basis of the case of the petitioner, plaintiff in O. S. No. 8 of 1917, upon issues 2,3 and 4 in that suit.

In O. S. No. 8 of 1917 the plaintiff sued one Tirunarayana Pillai for the possession of certain properties belonging to the estate of one Venkatakrishna Pillai asserting that a deed of indenture to which he was a party in 1905 contained false recitals as to Tirunarayana Pillai's relationship to the plaintiff's maternal uncle Venkatakrishna Pillai and his adoption to Venkatachalam Pillai.

In O. S. No. 56 of 1920 the plaintiff who is the son of the plaintiff in O. S. No. 8 of 1917 sues the defendant for an account of the management of his estate alleging that he got title to it under the suit indenture.

In both suits questions arise as to the validity and binding character upon the petitioner of the indenture and whether he is estopped by reason of it from questioning the title of the defendant in the former suit and the title of the plaintiff in the second suit.

The attitude of the pleaders appearing for the plaintiff in O. S. No. 56 of 1920 will, it seems to me, naturally conflict with the attitude they have taken up for the plaintiff in O.S. No. 8 of 1917.

The matter does not rest there. The petitioner has sworn in his affidavit dated 24-7-1920 that he has given confidential information and disclosed to them the contents of records in his possession for the conduct of O. S. No. 8 of 1917 (See paragraphs 16 to 19 of that affidavit). The 1st respondent denies in paragraphs 12 and 13 of his counter-affidavit dated 23-8-1920 that he received any confidential communications in O. S. No. 8 of 1917 or that he made use of such information when he drafted the plaint in O. S. No. 56 of 1920. If his denial is true, I can only conclude that he did not do his duty

towards his client, a part of that duty being to thoroughly familiarise himself with all the ins and outs of his client's case and to study it from every aspect. It is not reasonable to suppose that in preparing the plaint in O. S. No. 8 of 1917 this pleader picked up no internal information about the facts concerned with his client's case and it will not be in accordance with human nature to expect him to divest his mind of the knowledge he has so acquired. It is an elementary principle of professional ethics that it is not proper for a legal adviser to use knowledge obtained in one case to the detriment of his client in another case—Vide Lord Eldon's judgment in *Cholmondely v. Clinton* ¹ and *Pallonji Merwanji v. Kallobhai Lallubhai* ². In my opinion there is a danger of that occurring in this instance and it can only be avoided by not allowing the respondent to appear and conduct O. S. No. 56 of 1920, for the plaintiff in that suit.

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In the lower court a further doubt seems to have arisen whether O. S. No. 56 could be defined as a proceeding arising from the other suit and in this court also it has been argued that it must be something "flowing out of the former proceeding.". These words are taken from the expression of Hall V. C. in *Little v. Kingswood Collieries Company* ³ and are quoted by Miller, J. in *Srinivasa Rao v. Pichai Pillai*. ⁴

In interpreting a rule of this court we need not look beyond the language of that rule. The rule prohibits a pleader who has drawn pleadings or acted for a party in any suit from appearing for that party's opponent in such suit "or in any matter connected therewith". These words are wide enough to include a subsequent suit if it is connected with the earlier one and two suits will ordinarily be considered connected if they have any issue in common or involve substantially a determination of the same question of fact or the same mixed question of law and fact.

In the lower court and again in this court an attempt has been made to make something out of a High Court Circular, 679 of 1869, which is printed as a foot-note to R. 277 in the Civil Rules of Practice.

The meaning of this circular as abstracted is not quite clear, but it evidently does not apply to cases in which the

1. 19 Ves. Jun. 261.

2. (1887) 1 L. R. 12 Bom. 85

3. (1882) 20 Ch. Division. 732.

4. (1913) 1 L. R. 38 Mad. 650.

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same parties oppose each other in successive suits. If it purported to lay down anything contrary to the rule itself we should decline to be guided by it.

In the result, the petitioner is entitled to succeed and the Subordinate Judge will be directed to refuse to allow the respondents to conduct O. S. No. 56 of 1920 for the plaintiff.

The parties will bear their own costs in this court.

Ramesam, J

Ramesam, J. :—The decision of the Revision Petition before us depends on the construction of R. 277 of the Civil Rules of Practice. It has been held in *Srinivasa Rau v. Pichai Pillai* ¹ that "the rule is not to be given too narrow a scope, and should be interpreted as liberally as its language will allow" and the "matter" in the latter part of the rule includes a suit. With this conclusion, I agree. A number of English decisions and the case in *Pallonji Merwanji v. Kallubhai Lallubhai* ² and *Government Pleader v. Bhagubhai Dayabhai*. ³ have been cited before us as bearing on the construction of the words "connected therewith". I see no reason to interpret the word in the light of those decisions or to limit its scope. The word is not a term of art and I am disposed to construe it according to its ordinary meaning. Any possible hardship on practitioners by such an interpretation is avoided by the limitation in the rule, *viz.*, that it prohibits the pleader from appearing only "for any person whose interest is opposed to that of his former client" and by the consideration that the proviso to the rule can be so worked as to furnish a loophole and that the court can always authorize the practitioner to appear in a proper case. One would expect that the pleaders themselves would interpret the rule liberally in favour of the clients and against themselves in the interests of the profession.

On the facts of this case which are set forth in the judgment of my learned brother and which I need not repeat, I am of opinion that the second suit (O. S. No. 56 of 1920) is a matter connected with the first suit (O. S. No. 8 of 1917). Mr. Venkatrama Sastri who appeared for one of the vakils strenuously contended that the facts relating to the deed of indenture need not be gone into in the second suit and it is the case of the plaintiff that he should succeed solely on the ground of estoppel. I do not express any opinion on the question of

1. (1913) I L R. 38 Mad, 650,

2 (1887) I. L. R. 12 Bom. 85.

3. (1912) I. L. R. 36 Bom. 506.

estoppel. But I may observe that the first issue in O. S. No. 56 of 1920 raises the Validity of the deed apart from estoppel and though Mr. Sastri informs us that it is likely to be given up we cannot assume it as the plaintiff in O. S. No. 56 of 1920 is not represented before us. In my opinion, the better course for the vakils would have been not to have anything to do with the framing of the plaint and the institution of the suit, O. S. No. 56 of 1920, but to take up the cause of the plaintiff only if they are not engaged by the defendant. It is also contended that, as the vakils were not engaged in the Criminal Proceedings, the proviso applies. In my opinion, the application of the proviso must be confined to the criminal cases apart from the fact that the question in the criminal cases related to possession only and therefore its connection with the civil litigation was much less than the connection between the suits themselves.

I agree with the order proposed by my learned brother.
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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR JOHN WALLIS, CHIEF JUSTICE AND MR. JUSTICE OLDFIELD.

Vaithinatha Ayyar (dead) and another ... *Petitioners* * (L. Rs.
v. of the deceased appellant).

Govindaswami Odayar and
anothers ... *Respondents.* (Respondents.)

Limitation Amending Act, of 1920—Applicability—Death before Act—application to bring on record legal representatives after Act—Effect—C.P.C. of 1908—O. 22, R. 9 (2)—Sufficient cause—Meaning—Slip or mistake of Counsel is and when sufficient cause—English Law—Inapplicability in India.

The Limitation Amending Act of 1920 applies to an application for bringing on record the legal representatives of a plaintiff appellant made after the Act came into force even in cases in which the death of the plaintiff took place before that date.

The rigid English rule that a mistake or slip of Counsel is not sufficient cause for not continuing a suit is inapplicable in India.

Where plaintiff's widow as the guardian of her minor sons gave instructions to bring on their names in November 1920 in ample time, and owing to the mistake of her vakil in not noticing that under an amending Act a shorter period of limitation would be coming into force from 1st January 1921, the legal representative application was not filed within the period allowed by the Amending Act but was filed after that date and before the expiry of the period allowed by the old Act. *Held*, that the delay due to a slip of that kind on the part of the Vakil without any default of the client herself might be regarded as sufficient cause for excusing the delay within the meaning of O. 22, R. 9 (2) of C. P. C.

*C. M. P. 543 of 1921.

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Petition praying that in the circumstances stated in the affidavit filed with C. M. P. No. 544 of 1921 on the file of the High Court the High Court will be pleased to excuse the delay in seeking to set aside the abatement of appeal No. 137 of 1920 preferred to the High Court against the decree of the Subordinate Judge of Negapatam in O. S. No. 59 of 1918.

K. V. Krishnaswami Aiyar for Appellant.

S. Subramania Aiyar for Respondent.

The Court passed the following

Wallis, C. J.

Order :—*The Chief Justice :—*This is an application under O. 22, R. 9 (2) to set aside an abatement. The deceased plaintiff appellant died on 31st July 1920 when the time limited for bringing on his legal representatives was six months under Art. 176 of the Limitation Act of 1908. By an amending Act, which was passed early in September 1920 and came into force on the 1st January 1921, the time was reduced to ninety days. It has been contended before us, that, as the death of the plaintiff took place before the amending Act was passed, the petitioner was in time in filing his application on 17th January 1921 within six months of her husband's death. Precisely the same question arose in *Aravil Kalliamma v. Sankaran Nambudripad* ¹ as regards the reduction by the Limitation Act of 1908 of the period for bringing in legal representative from three years to six months, and it was decided that the application which was made after the coming into force of the Limitation Act of 1908 was governed by it. The question was further considered and the same view was taken with reference to a case under Art. 164 in *Chidambaram Chetti v. Karuppan Chetti* ², where *The Ydum* ³ and *Hope Mills v. Vithaldas* ⁴ were also cited in the judgment. The first of these cases was a decision of the Court of Appeal in England and is expressly in point. The general rule laid down in the earlier of these cases is that new rules of limitation, which are regarded merely as matters of procedure, applying to causes of action which arose before the enactment of the rules. By postponing the coming into force of the amending Act from the beginning of September, when it was passed, to the 1st of January the legislature as regards deaths occurring before the passing of the amending Act allowed a longer period than it considered should ordinarily be

1. (1910) I.L.R. 34 Mad. 292; 20 M.L.T. 347. 2. (1910) I.L.R. 35 Mad. 678.

3. (1899) P. 236.

4. I. L. R. 12 Bom. 730.

applicable in future, and therefore there is no ground should be an exception from the ordinary rule as regards enactments whatever for presuming that it intended that the enactment relating to procedure. In *Rajah of Pittapur v. Venkatasubba Rao* ¹, the reason the majority of the Full Bench held that the provision in question did not repeal S. 7, of the Limitation Act retrospectively as regards the particular cause of action was that any other construction would in the case before the Court have taken away the right of suit altogether by leaving no time in which to exercise it. That case has no application here.

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Wallis, C. J.

The next question is whether the appellant has proved that he was prevented by any sufficient cause from continuing the suit within the meaning of O. 22 R. 9 (2). The only cause alleged is the mistake or slip of the pleader and there can be no doubt that according to the rule which the Court of Appeal in England regarded as binding upon them in *In re. Coles and Ravenshear* ² this would not be sufficient cause. In that case, however, Collins M. R. and Cozens Hardy L. J. followed the previous decisions with reluctance, and it has been held in two cases in Calcutta *Bishendut Tewari v. Nandan Pershad Dubey* ³ and *Rakhai Chandra Ghosh v. Ashutosh Ghosh* ⁴ where the question was carefully considered that the rigid English rule was inapplicable in India. Here the plaintiff's widow as the guardian of her minor sons gave instructions to bring on their names in November 1920 in ample time, and the mistake appears to have been due to her vakil's failure to notice that under an amending Act a shorter period of limitation would be coming into force from the 1st January 1921. On the particular facts of the case I think the fact that a delay due to a slip of this kind on the part of the vakil without any default of the client herself may be regarded as sufficient cause for excusing the delay. Delay is excused.

Oldfield, J. :—I agree that this application is out of time. As regards the decision in *The Ydum* ⁵ and other similar cases cited, I desire to say that they were before me in *Viswanath Sastri v. Sithalakshmi Ammal* ⁶ and that the refusal in my judgment therein to infer from postponement of the operation of a statute an intention that it should have retrospective effect requires reconsideration.

Oldfield, J.

1. (1915) I. L. R. 39 Mad. 645 : 29 M.L.J. 1.

3. (1907) 12 C. W. N. 25.

5. (1899) P. 230.

2. (1907) I. K. B. 1.

4. (1913) 17 C. W. N. 807.

6. (1920) (13 L. W. 37).

In the exceptional circumstances of the case I am not prepared to dissent from the conclusion that the delay in presenting this application should be excused.

A. S. V.

PRIVY COUNCIL.

PRESENT LORD BUCKMASTER, LORD DUNEDIN, LORD SHAW
SIR JOHN EDGE AND MR. AMEER ALI FEBRUARY 14 AND 15, 1921

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Raja Peari Mohan Mukerji ... *Appellant.*

v.

Monohar Mukerji and others ... *Respondents.*

Kumar Bhupendra Nath Mukerji ... *Appellant.*

v.

Monohar Mukerji and others ... *Respondents.*

P, C

Raja Peari
Mohan
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Mukerji.

Religious Endowment—Office of Shebait—Grounds for removal—Incapacity of trustee to purchase trust estate—Not confined to case of trustee for sale—Basis of the rule—Secret purchases by trustee—Never permissible.

The grounds for removing a Shebait from office may not be identical with those upon which a trustee would be removed in England, but if a Shebait in the exercise of his duties has put himself in a position which precludes him from faithfully discharging the obligations of his office, that is sufficient ground for his removal.

A trustee, if not a trustee for sale, can acquire an estate from beneficiaries who are sui juris, but only if he has made the fullest disclosure to them of all facts within his knowledge as to the value and condition of the estate and the parties are at arm's length, otherwise the purchase is bad. The basis of the rule is that a person occupying a fiduciary relation may not use for his own benefit information which he has acquired as to the trust estate.

Nugent v. Nugent is approved

Even if a person in a fiduciary position is otherwise entitled to purchase, yet if he effects the purchase secretly in another person's name such purchase can never be allowed to stand.

Consolidated appeals from a decree of the Calcutta High Court dated July 24, 1919, reversing a decree of the Second Subordinate Judge of Hooghly, (Dec. 23, 1915.)

The facts of the case are sufficiently stated in their Lordship's judgment.

Sir John Simon, K. C. (with him *Dé Gruyther*, K. C. and *Parikh*) for appellants: There are two questions here: whether Lot Bahirgora is part of the trust estate, and whether the Raja should be removed from his office of Shebait. Some previous

litigation is reported at 37 I. A. 27. In that litigation a judgment was given against the trust estate. This village, Lot Bahirgora, was put up for sale. The Raja did his best to stop the sale, and finally bought the property at an exorbitant price. It is a matter of indifference to us whether the purchase stands, except that it is made a principal ground for removing us from office. I submit the purchase was good. The sale was not ipso facto void, but at most voidable.

Lord Buckmaster : If the beneficiary applies to set aside the sale, the burden is on the trustee to show why it should not be set aside.)

The sale was not a sale by the Raja. The relation of trustee had ceased : the Raja had broken off all connection which put a duty upon him. The estate was taken out of his hands and the property attached and sold at the instance of the judgment creditor. Reference was made to Lord Cairns-judgment in *Thomson v. Eastwood* ¹ and to *Dougan v. Macpherson* ² as to the duties and obligations of trustees dealing with their *cestui que trustent* and to the Code of Civil Procedure Act V of 1908 O. 21, R. 64 etc. as to the conduct of execution sales in India. In India the sale is in the hands of the Court: the trustee here neither sold nor procured the sale.

(*Lord Shaw* referred to rule 73. They are trying to exclude every one who has any interest in keeping the price down.)

(*Lord Buckmaster* : Is it not the duty of the trustee to give all the information in his power ?)

In India the Court ascertains all material particulars and states them in the proclamation of sale, Order 21 rule 66. The Subordinate Judge aptly points out that when the law excludes a judgment debtor from bidding, it does so in express terms, as in the Bengal Tenancy Act and that the Code of Civil Procedure does not exclude him.

It was laid down by Field J. in *Plowright v. Lambert* ³ that a trustee for sale cannot sell to himself, and that even if he be not a trustee for sale, the burden of proof lies on him to show that every possible advantage has been gained for the trust. I accept that burden. The matters to be stated in the sale proclamation are all to be found in the public records. The sale here is not only not by the trustee, but it is by a person who is adverse to the trustee..

1. (1877) 2 A. C. 236.

2. (1902) A. C. 197 at P. 204.

3. (1885) 52 L. T. 646 at pp. 652, 653.

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(*Lord Buckmaster* : The difficulty is that the trustee has had the advantage of acquiring special information. It is like the case of a solicitor : the mere possession of knowledge may disqualify.)

Nugent v. Nugent ¹, where it was held that a Receiver appointed by the Court could not purchase the property.

That may be distinguished as being the case of a Receiver and any how is not binding on this Board.

(*Dunne, K. C.*, for respondents) *Nugent v. Nugent* ² went to the Court of Appeal :

It has been argued the leave of the Court must be obtained and that anyhow the purchase must not be made in another name : and reliance has been placed by the High Court on *Lewis v. Hillman* ³, and *Macpherson v. Watt* ⁴, but these cases both proceed on the assumption that the trustee has something to do with the sale. Under the scheme in India for such sales the Shebait's connection of duty with the property has ceased. It has been held in the United States that a trustee may purchase trust property at a judicial sale which has been brought about by a third party, which he has taken no part in procuring and could not have controlled : *Allen v. Gillette* ⁵. That is practically this case. As to the Shebait's obtaining the leave of the Court, there is no provision for it in the Code of Civil Procedure. In the Bengal Tenancy Act there is an express provision.

(*Lord Buckmaster* : The Court exercises that jurisdiction here without any rule.)

If this first point is decided against us I contend that I should be repaid from the trust estate the amount which I paid through my son.

As to the removal of the shebait there are six items of misconduct mentioned in the plaint and we have complete answers to all of them. The High Court have been very much prejudiced against us by the view they have adopted as to the purchase. There is no good ground for removal made out.

(*Lord Dunedin* : The harder the case is against you on the first point, the less it should affect the decision on the second.

1. (1907) 2 Ch. 292.

3. (1852) 3 H. L. C. 607.

5. (1887) 127 U. S. 589.

2. (1908) 1 Ch. 546.

4. (1877) 3 A. C. 264.

Mr. Ameer Ali: The burden of the charge against you is what your acts have led to.)

Dunne K. C. (Kenworthy Brown with him) for respondents: The *cestui que trust* here is an idol and can have no knowledge except through the Shebait: the idol cannot be put on enquiry, for you cannot give it knowledge. The principle of *Nugent v. Nugent*. (supra) applies. If the shebait has bought at all and could possibly be in a position where his interest and duty conflicted it ends the matter. Here also appellant did not state the truth as to the purchase and in fact committed perjury. In *Macpherson v. Watt*¹ such suppression of the purchase was held sufficient to upset it. If an agent can show he is entitled to purchase property, notwithstanding his character of agent, yet if instead of purchasing openly, he purchases in the name of a third person without disclosing the fact, such purchase is void, *Lewis v. Hillman*². Appellant here swore throughout he did not buy the property.

On the other part of the case the purchase was only one of several circumstances justifying the Raja's removal. He was quite reckless in his litigation as to what cost he put upon the estate.

De Gruyther, K. C. replied, more especially as to the form of order.

Their Lordships' Judgment was delivered (April 19, 1921) by.

LORD BUCKMASTER.—Many questions were originally involved in the dispute which has given rise to this appeal, but of these two only remain. The first relates to the continuance of the appellant Raja Peary Mohan Mukerji in the office of shebait to the debtor estate of Sri Sri Iswar Gopaleswar Shiva Thakur and Sri Sri Iswar Shridhar Thakur, and the second to the purchase in January, 1913, of a certain Lot known as Lot Bahirgora, which was sold in execution under circumstances to which their Lordships will briefly refer.

By his Will, dated the 11th September, 1840, Jaga Mohan Mukerji dedicated certain properties to the worship of the two Thakurs established by him, for the annual celebration of the Durga Puja, the Sradh of ancestors, and other pious usages, the Will providing for the order of succession to the office of the Shebait among the testator's own descendants. The testa-

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1, (1877) 3 A. C. 254.

2 (1852) 3 H. of L. Cases 607.

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tor died shortly after the execution of his Will, and in September of 1890 the succession to the Shebaitship opened, owing to the death of the then Shebait. Disputes arose as to who was the true successor, which resulted in a decree of the 29th January, 1894, that one Bijoy Krishna was the rightful Shebait, but on the day of the decree he died. Further litigation then ensued between the sons of Bijoy Krishna and the Raja who is the appellant in the first of these appeals, which ultimately resulted in a decree of the 30th June, 1903, made by the Subordinate Judge in favour of the sons of Bijoy Krishna for Rs. 45,960, which sum it was ordered should be recovered by the plaintiffs out of the debottar estate in the hands of the Raja as its Shebait. Appeals were taken from this judgment to the High Court, and again from the High Court to His Majesty in Council, but these appeals failed. Execution proceedings were then instituted in order to secure a sale out of the debottar estate of the Lot that is now in dispute, and on the 14th January, 1913, the said Lot was sold at a public Court sale for Rs. 1,56,600 to the appellant in the second appeal, who is the son of the Raja.

On the 17th February, 1913, proceedings were taken by Monohar Mukerji, who is the first respondent to these appeals, asking among other things for the removal of the Raja from the office of Shebait and for an order to set aside the purchase of the estate. The subordinate Judge dismissed the suit, but he held, contrary to the contention of the Raja's son, that the purchase was benami and made with the Raja's money for his benefit. An appeal was taken from the decree following this judgment to the High Court of Calcutta and was allowed. The High Court supported the view that the sale was in fact benami for the Raja who held a fiduciary position in relation to the estate and they held that in these circumstances the purchase could not be supported. They also decided that the Raja should cease to be shebait and that management of the estate should be vested in a Receiver to be appointed by the Court. A decree was accordingly drawn up carrying out these views, and from this decree both the Raja and his son have brought the present appeals, which have been consolidated by an Order in Council.

Upon the question of the removal of the Raja, the learned Subordinate Judge thought that there was no sufficient charge of misconduct to justify his removal; but the High Court took a

different view, and thought that the protracted litigations by which the estate had become heavily burdened with debts, and the circumstances associated with the claims which he was seeking to establish against the estate for litigation expenses, were such as to render it undesirable that he should continue in the office. They also found that the purchase could not be sustained. Their Lordships are not prepared to interfere with these conclusions. The grounds for removing a Shebait from his office may not be identical with those upon which a trustee would be removed in this country. The close intermingling of duties and personal interest which together make up the office of Shebait may well prevent the closeness of the analogy, but as part of the office it is indisputable that there are duties which must be performed that the estate does need to be safeguarded and kept in proper custody, and if it be found that a man in the exercise of his duties has put himself in a position in which the Court thinks that the obligations of his office can no longer be faithfully discharged, that is sufficient ground for his removal. It is this that forms the foundation of the judgment of the High Court, and the appellant has not satisfied their Lordships that the facts were misinterpreted or the reasoning unsound,

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Upon the remaining question also their Lordships think that the High Court was right. The argument in favour of the appellant here also turns upon the dissimilarity between the office of Shebait and the ordinary office of a trustee. A trustee for sale cannot purchase; he cannot purchase because the same person cannot be both vendor and purchaser, and he who acts for another cannot also act for himself. But even if he be not a trustee for sale, if in any capacity he is trustee of the estate, although his incapacity to buy is not absolute and is subject to different limitations it is equally well established. A trustee may indeed acquire from beneficiaries who are *sui juris* an estate in which they are interested, but he can only do this if he has made the fullest disclosure to them of all the relevant and material facts within his knowledge affecting or that might affect the value and condition of the estate and the parties are at arm's length, the *cestui que trust* knowing that he is dealing with the trustee. Otherwise to purchase is bad, and it is bad because any person who occupies a fiduciary relationship may be able by virtue of his position to acquire information with regard to the

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trust estate which he is not permitted to use for his own benefit. Their Lordships recognize the force of the argument that points out the dissimilarity between a Shebait and trustees to whom this rule applies. There is no doubt that the word "trustee" covers a very large number of relationships involving different obligations; the word "trust," therefore, may be so used that it is intended to apply only to one class of such duties; and it follows that rules and decisions which depend upon the special conditions attached to the particular class would not of necessity apply to another where these conditions did not exist. The rule forbidding the purchase of an estate by a person who stands in regard to his dealings with it in a fiduciary relationship is, however, general in its application. In the case of *Nugent v. Nugent*¹ it was held that a Receiver appointed by the Court cannot purchase the property of which he is receiver without the leave of the Court, even where the sale is not made in the action in which he was appointed, but by a mortgagee selling with leave outside the suit. Their Lordships think that this was a correct decision and shows the wide area of dispute which is covered by the rule.

Further, in the present case it is now established by two concurrent findings of fact that the Raja purchased the property benami in the name of his son, and by this means concealed the fact that he was the real purchaser; Their Lordships bear in mind that such classes of purchase are very common in India and are due to many considerations which may not find their counterpart here, yet none the less they can easily be made a cloak and cover for improper and even dishonest transactions, and they think the rule laid down by Lord St. Leonards in *Lewis v. Hilman*² that even if an attorney or agent can show that he is entitled to purchase, yet if instead of openly purchasing, he purchases in the name of a trustee or agent without disclosing the fact, no such purchase as that can stand for a single moment, should apply to this case.

Their Lordships have not overlooked the fact that in the present instance the purchase was for an abundant price, one that is said to be largely above its market value, but such considerations cannot have weight where the purchase is challenged upon the grounds in the present suit.

1. (1907) 2 Ch., 292

2 (1852) 3 H. L. C., 607.

It is unnecessary to examine further in detail the law upon this matter, for it is fully, and their Lordships' opinion accurately analysed in the judgment of the High Court, where the relevant authorities are quoted and properly applied. They think, therefore, that this appeal must fail and that an order must be made declaring that the purchase by the second appellant was invalid and that proper and necessary steps should be taken to secure the property ; and that the first appellant is entitled, subject as herein mentioned, to repayment of the purchase money. An account should be directed showing what, if anything, is due from the first appellant to the estate, and such money should be deducted from the purchase money, the balance, if any, of the moneys in Court to be paid out and the first appellant to have a charge on the estate for such sum. The appellants will pay the costs of the appeals.

They will humbly advise His Majesty to this effect:

Solicitor for Appellants :—*E. Dalgado*

Solicitor for Respondents :—*Vallance and Vallance.*

A. P. P.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE RAMESAM.

Kancherla Kanakayya

... *Appellanti.* (2nd Petitioner-Transferee decree-holder.)*

v.

Mulpuru Kotayya and others

... *Respondents (Respondents and 1st petitioner-judgment-debtors and decree-holder.*

Civil Procedure Code, O. 32, R 7—Transfer of decree in favour of minor by next friend—Leave of court, if essential.

The next friend of a minor, who obtains a decree in the minor's favour, cannot transfer the decree to a third party, without obtaining the leave of the court. But the requisite leave may be granted at any stage of the proceedings.

Shaik Davud Rowther v. Paramasami Pillai (1) followed.

Govindarajalu Naidu v. Ranga Rao (2) dissented from.

Appeal against the appellate order of the court of the Subordinate Judge of Bezwada dated 22-1-1920 in A. S. No. 178 of 1919 preferred against the order of the Court of the Temporary District Munsif of Gannavaram at Bezwada dated 13—3—1919 in E. P. No. 2 of 1919 in O. S. No. 2 of 1915.

* A. A. O. No. 134 of 1920.

4th February, 1921.

1. (1916) 31 M. L. J. 207.

2. (1920) 40 M. L. J. 124.

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Kancherla
Kanakayya
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Kotayya
and others.

D. Appa Rao and P. Narayanamurthi, for appellant.

T. Ramachandra Rao, for the Respondent.

The Court delivered the following

Judgment :—The question in this appeal is whether the next friend of a minor can after obtaining a decree in the minor's favour transfer that decree to a third party without the leave of the Court.

A transfer involves an agreement between the transferor and the transferee, and under O. 32, R. 7 every agreement by a next friend on behalf of a minor with reference to the suit in which he acts requires the leave of the court.

There is no reason for reading the word "suit" in this rule as meaning only a suit in which a decree has not been passed.

We do not find anything in the context to suggest this, and we must dissent from the opinion of Abdur Rahim and Odgers, JJ. in *Govindarajulu Naidoo v. Ranga Rao* ¹ on this point and follow that of Sadasiva Ayyar and Moore, JJ., in *Shaik David Rowther v. Paramasami Pillai* ² which adopts a contrary view and does not seem to have been brought to the notice of the learned Judges who decided *Govindarajulu Naidoo v. Ranga Rao* ¹.

There is nothing to prohibit the court giving its sanction at any stage. The appeal will be remanded to the District Munsif of Nuzvid for consideration whether the transfer will be for the benefit of the minor and for passing orders accordingly. Costs in this and in the Lower Appellate Court will abide the result.

A. V. V.

Appeal remanded.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE RAMESAM.

Ratnathanni

... *Appellant* * (*Plaintiff*.)

v.

Somasundara Mudaliar

... *Respondent* (*Defendant*.)

Ratnathanni
v.
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sundara
Mudaliar

Hindu Law—Marriage—Brahma or asura form—Money paid to bride's father for marriage expenses.

▪ Second Appeal No. 1020 of 1920.

19th January, 1921

1. (1920) 40 M. L. J. 124.

2. (1916) 81 M. L. J. 207.

Where, as a term of the contract of marriage, money is paid by the bridegroom to the bride's parents to enable them to meet the expenses of marriage, the marriage is one in the *asura* form. *Muthu Iyer v. Chidambara Iyer* (1) Relied on.

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Second Appeal against the decree of the Court of the Temporary Subordinate Judge of Tanjore in Appeal Suit No. 41 of 1919. (A. S. No. 489 of 1918 on the file of the District Court) presented against the decree of the court of the District Munsif of Tanjore in Original Suit No. 25 of 1917.

S. *Muthiah Mudaliar*, for the appellant.

T. V. *Gopalaswami Mudaliar* for the respondent.

The Court delivered the following.

Judgments :—*Ramesam, J.* :—It is admitted that the defendant paid Rs. 200 to the plaintiff before the marriage. It is clear from the evidence and from the pleadings that the payment of Rs. 200 for the expense of the marriage was a term of the contract of marriage. That being so, it follows that the payment was made for the benefit of the plaintiff. In the absence of the payment, she would have had to find the amount in some other way, by borrowing or pledging her jewels or other properties. The cases relied on by the vakil for the respondent viz, *Hira v. Hamaji Pema* ², *Jaikisondas Gopaldas v. Harkisondas Hullochand Das*, ³, *Authikesavulu Chetty v. Ramanujam Chetty* ⁴, *Reverend Gabrielnathaswami v. Valliammai Ammal*. ⁵ have no bearing on this case. In *Hira v. Hamaji Pema* ² the payment was for the benefit of the third husband. In *Jaikisondas Gopaldas v. Harkisondas Hullochandas* ⁶ it was for the benefit of the bride. In *Authikesavulu Chetty v. Ramanujam Chetty* ⁷ the payment was not of a price but a small customary present. In *Reverend Gabrielnathaswami v. Valliammai Ammal* ⁸ an enquiry was directed into the meaning of the word "Parisam". I think the case in *Muthu Aiyar v. Chidambara Aiyar* ⁹ applies to this case and I see no reason to differ from it. As pointed out by Steele, it is the essence of a Brahma form of marriage that the parents should incur the expense of the marriage (page 24) and so far as I am aware, the general usage is in accordance with this statement. No special custom among Mudaliars to the effect that the bride-

Ramesam, J.

1. (1893) 8 M. L. J. 261.

2. (1912) I. L. R. 37 Bom. 295.

3. (1876) I. L. R. 2 Bom. 9.

4. (1909) I. L. R. 32 Mad. 512 at p. 516.

5. (1919) 10 L. W. 491.

6. (1876) I. L. R. 2 Bom. 9.

7. (1909) J. L. R. and 32 M. 512 at P. 516.

8. (1991) 10 L. W. 491.

9. (1893) 8 M. L. J. 261.

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groom should incur the expense of the marriage has been pleaded. On the other hand, the statement of M. Leon Sorg quoted in Mayne, page 100, shows that the *asura* form is common among the Tamil population, meaning probably the Sudias. I therefore find following *Muthu Aiyar v. Chidambara Aiyar* ¹ that the marriage is in an unapproved form.

The result is that the second appeal will be allowed and the plaintiff will be given a decree for the properties in A schedule and item 1 of B schedule which are admitted to be the properties of the deceased and as to which only the appeal is pressed or for their value Rs. 445-8-0. Plaintiff will have proportionate costs in the first Court and all costs here and in the Lower Appellate Court.

Spencer, J.:—I agree.

Spencer, J.

It is not disputed that the sum of Rs. 200/- was paid by the bridegroom to the bride's parents for the expense of the marriage.

This being so, it follows from *Muthu Aiyar v. Chidambara Aiyar* ¹ that the marriage was in the *asura* form, as it is customary for the bride's parents to defray the cost of marriage in all Brahma form of marriage (*Vide* Steele on Hindu customs).

In my opinion the test is not to see how the money was utilised, as it would be impossible after payment to control the uses to which it might be put, but to see whether the parents were benefited by the payment. It is idle to contend that the parents are not benefited by a payment which relieves them of the burden of an expense to which they would ordinarily be subject.

A. V. V.

Appeal allowed.

IN THE HIGHT COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE ODGERS.

Vythilinga Padayachi and three
others

... *Appellants* * (*Plaintiffs.*)

v.

Ponnuswami Padayachi.

... *Respondent* (1st defendant.)

Vythilinga
Padayachi

v.
Ponnuswami
Padayachi.

Insolvency—Official Receiver—Receiver not appointed Receiver of property—Effect—Possessory title—Suit upon—Maintainability—Adverse possession—Interruption of—Declaratory suit regarding property subject to adverse possession—Effect.

* S. A. No 307 of 1920.

12th October, 1920.

1. (1893) 3 M. L. J. 261.

The property of a person adjudicated an insolvent under the provisions of the Provincial Insolvency Act, 1907, does not *ipso facto* vest in the Official Receiver who may have been appointed for the local area in which the insolvent is residing, but it is necessary that an order should have been passed appointing a Receiver before the property would vest in the local Official Receiver. *Held*, therefore, that a sale of the property of a person adjudicated an insolvent by the Official Receiver of the local area appointed under S. 19 of the Act but not appointed Receiver of the property in question was not effectual to pass title. The purchaser in such a case cannot be held to have acquired a good title from the Court merely on the strength of the fact that it directed the delivery to him of the possession of the property sold.

Vythilinga
Padayachi
v
Punnuswami
Padayachi.

Where the purchaser was by order of Court put in possession of the property purchased after dispossessing another who was in possession thereof till the date of such dispossession, *held, further*, in a suit by the latter to recover possession of the property from the former, that, inasmuch as the purchaser acquired no title from his purchase, the plaintiff was entitled to recover possession from him on the strength of his (plaintiff's) possessory title.

Quære whether, where property belonging to A and in the adverse possession of B is attached by A's creditors as his property, and, on a claim by B thereto being allowed, is made the subject of a suit under O. 21, R. 63 C. P. C. which is decided by the High Court in Second appeal in favour of A's creditors, B's possession from the date of attachment till the date of the decree of the High Court is ineffective for the purpose of completion of title by adverse possession.

Second Appeal against the decree of the Court of the Subordinate Judge of Mayavaram in Appeal suit No. 24 of 1918 (A. S. No. 989 of 1917 on the file of the District Court) preferred from the decree of the court of the District Munsif of Shiyali in Original suit No. 196 of 1916,

B. Sitarania Rao for *T, R. Venkatarama Sastri* for appellants.

T. Narasimha Aiyangar for respondent.

The Court delivered the following

Judgments :—*Abdur Rahim, J.* The first plaintiff and the grandfather of the 4th plaintiff in this suit obtained the properties in dispute in exchange from one Srinivasa Aiyar on the 3rd August 1900 but no registered deed was executed as is required by law and therefore there was no effective transfer of title to the plaintiffs. The plaintiffs however remained in possession of the properties since that date. On the 29th April 1910, they were attached at the instance of one Chidambaram Chetti, who had obtained a decree against Srinivasa Aiyar. The plaintiffs put in a claim on the 1st October 1910 and it was allowed by an order dated the 1st December 1910. Then Chidambaram Chettiar, the attaching creditor, instituted a suit under the provisions of the Code of Civil Procedure to establish that the properties belonged to his judgment-debtor and that he was

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entitled to attach them and bring them to sale in discharge of his decree. This was on the 21st December 1910. A decree was passed in that suit in his favour on the 3rd November 1911. That was ultimately confirmed by the High Court in Second Appeal on the 24th September 1913. During the pendency of this suit, that is, on the 3rd November 1911 Srinivasa Aiyar was adjudicated an insolvent on his own petition. Then the Official Receiver of the Tanjore District sold the properties to the 1st defendant in the suit on the 18th November 1915 ; and on the 15th January 1916 the latter obtained delivery of possession of the properties.

Soon after the defendant obtained possession the plaintiffs instituted this suit asking for a declaration of their title and for confirmation of their possession of the plaint mentioned properties or in the alternative for recovery of possession of the properties if they were found not to be in their possession. They succeeded in the court of trial but on appeal the Subordinate Judge dismissed the suit holding that they had not made out their title and were not therefore entitled to a decree.

There were several questions argued before us in support of the plaintiff's title and it seems to us that they are entitled to succeed at least on one of those grounds. They were undoubtedly in actual possession of the properties as found by the lower appellate court at least till the 16th January 1916, if they are not in possession now. Conceding for the sake of argument and only for the sake of argument, because it is not necessary to decide the point that their possession from the date of attachment till the decree of the High Court in the suit instituted by the attaching creditor i.e., till the 24th September 1913 is ineffective for the purpose of completion of title by adverse possession they were indisputably in possession till 1916 and the defendant was put in possession by an order of court only on the 16th January 1916, and if the latter has no title, the plaintiffs are entitled to recover possession from him on the strength of their possessory title.

We need only refer to *Narayana Row v. Dharmachar* ¹ and *Ayyappan v. Secretary of State* ² in support of his proposition following the doctrine laid down in the well known English case of *Asher v. Whitlock* ³.

1. (1902) I. L. R. 26 Mad, 514. 2. (1912) I L R. 37 Mad. 298.

3. L. R. I. Q. B. D 1 at p. 6.

The next question for determination is the defendant's title. That depends on the question whether the sale in his favour by the Official Receiver, Tanjore, conveyed a good title to him or not. That again depends on whether the Official Receiver was duly appointed by the court as required by law. No order was passed appointing the Official Receiver, the Receiver of the estate in question although the local Government had appointed Mr. Narasimhamurthi Sastri under S. 19 of the Provincial Insolvency Act, III of 1907, Official Receiver of the District.

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It has been ruled by two decisions of this court in *The Official Receiver of Trichinopoly v. Somasundara Chettiar* ⁴ and afterwards in *Muthusami Samiar v. Somoo Kandiar* ⁵ where the question was even more fully considered that the property of a person adjudicated an insolvent under the provisions of the Act does not *ipso facto* vest in the Official Receiver who may have been appointed for the local area in which the insolvent is residing but it is necessary that an order should have been passed appointing a Receiver before the property would vest in the local Official Receiver. That is how the phrase "he shall be the Receiver for the purpose of every order appointing a Receiver issued by any such court" has been construed by two Benches of this Court, and having heard the question fully argued before us I see no reason whatever for holding that this view of the law is wrong.

As pointed out in this view of the law the present practice obtaining in this connection in many Insolvency Courts in the Presidency must be treated as not being in accordance with the law. All the same it is difficult to see how the words of Ss 18 and 19 can be construed otherwise than they have been by the learned Judges in the cases referred to.

It was suggested that the Act does not require a written order but that we ought to presume from the facts of the case that the Official Receiver must have been appointed a Receiver of this estate, although no written order was passed to that effect. Orders of court are invariably reduced to writing and in fact there is no ground for supposing that any verbal order appointing the Official Receiver of this estate was passed. The omission is merely the outcome of an imperfect understanding of the requirements of the Statute. Then it was further

1 (1916) 30 M. L. J. R. 415

2 (1920) 39 M. L. J. 438 12 L. W. 262.

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suggested that, as in the absence of a Receiver, the property of an adjudicated insolvent vests in the court and the court in this case directed the delivery of the possession of the property in dispute to the defendant, the defendant acquired a good title from the Court. But there was no conveyance by the Court or by any Officer empowered in that direction by the court which would have conveyed a valid title to the defendant.

We must therefore hold that the defendant has no title to the property and the plaintiffs who were in possession are entitled to recover possession of the property from the defendants. The result is that the decree of the Subordinate Judge must be set aside and that of the District Munsif restored with costs here and in the courts below.

Odgers, J. *Odgers, J.* I am also of opinion that the Subordinate Judge is wrong.

My learned brother has dealt with the facts and dates essential to this case. The first argument before us on behalf of the appellants was that the attachment in 1910 does not interfere with the adverse possession of the plaintiffs from the 3rd August 1900 and that as the first plaintiff remained in possession from the 3rd August 1900 till he was dispossessed in the year 1915, he had prescribed in a title as against the defendant. With regard to the question of the interference with the adverse possession by proceedings in the claim and in the suit we were referred by Mr. B. Sitarama Rao for the appellants to several authorities. Some of them it is not necessary to consider as in this case the suit itself was instituted within 12 years from 1900 before the adverse possession of the plaintiff had become perfected. The suit was in fact instituted on the 21st December 1910. Were it necessary, discussion might arise as to the effect of the cases cited before us *viz.* : *A. Raghunathachariar and another v. Thiruvengada Ramanujachariar* ¹ *Pandiyar Pillai v. Vellayappa Rowther* ² *Phul Kumari v. Ghanshyam Misra* ³ a decision of the Privy Council and the interpretation of that decision by the Full Bench of this Court in *Ramaswami Chettiar v. Mallappa Reddiar* ⁴. Apart from this there is the question as to whether the possession of the plaintiff is not good as against all the

1, (1911) 1 M. W. N. p 99

3 (1907) 1 L. R. 35 Cal 202.

2 (1917) 33 M. L. J., R.p. 316.

4, (1920) 35 M. L. J., R. p. 350.

world excepting the true owner as laid down in *Narayana Rao v. Dharmachar* ¹ and the other authorities cited in the judgment delivered by my learned brother.

However the only question necessary to decide is as to the defendant's title which if any he admittedly acquired by purchase from the Official Receiver in the insolvency of Srinivasa Aiyar. The question is "Was the Official Receiver in a position to convey any title to him". The learned Subordinate Judge has found as a fact that the Official Receiver was not appointed as Receiver under S. 19 of the Provincial Insolvency Act. S. 18 (1) of that Act runs as follows. "The Court may at the time of the order of adjudication or at any time afterwards appoint a Receiver for the property of the insolvent, and such property shall thereupon vest in such receiver." S. 19 provides for the appointment by the Local Government of such persons as it thinks fit to be receivers under the Act and S. 19 (2) runs as follows : "Where any Official Receiver has been so appointed for the local limits of the jurisdiction of any court having jurisdiction under this Act, he shall be the Receiver for the purpose of every order appointing a Receiver issued by any such court unless the court for special reasons otherwise directs". The important words in this sub-section are "for the purpose of every order appointing a receiver issued by any such court". It is argued that where it is intended to appoint a Receiver under S. 16 (2), the Receiver must be appointed by the court and unless such an appointment is actually made the person acting as receiver, if any, acts illegally. Mr. T. Narasimha Aiyangar in his argument for the defendant urged that the Receiver has been in possession of this property for some years and it must be taken if not as a fact in any case as an inference that his acts have been ratified by the court, and that it is probable that under S. 22 appeals have from time to time been made against his acts to the courts and that the court itself has had cognizance of the fact that he was in all these matters in insolvency acting as a Receiver. Unfortunately the hardship of the case arising as it may from a technicality cannot be allowed to affect the direct provision of law which I have pointed out and which has been construed by the decisions in *The Official Receiver of Trichinopoly v. Somasundaram Chettiar* ² and *Muthuswamiar v. Somoo Kandiar* ³

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1. (1902) I. L. R. 26 Mad. 514.

2. (1916) 30 M. L. J. 415.

3. (1920) 39 M. L. J. 438.

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quoted in the judgment of my learned brother. In my opinion the provisions of the act have not in this case been carried out. As pointed out by my learned brother, refuge cannot be taken in the argument that the court has put the defendants in possession. There is no document of any kind purporting to be executed by the court on this behalf to the defendants and conveying this property to them. The learned Subordinate Judge gets over this difficulty by saying that the opinion of Mr. Justice Moore in *The Official Receiver of Trichinopoly v. Somasundaram Chettiar*¹ is only an obiter dictum and apparently the opinion of the Subordinate Judge is influenced by the fact that it has been the practice in the mufussal courts for the Official Receiver to take charge of properties without special appointment. However there is a more recent case, *Muthuswamiar v. Somoo Kandiar*¹ which supports the earlier case, *The Official Receiver of Trichinopoly v. Somasundaram Chettiar*². I am therefore unable to see how the express provisions of the act can be avoided.

In this view of the case it is unnecessary to decide whether the attachment proceedings and the subsequent suit interfered with running of the adverse possession of the plaintiffs or not. I desire to express no opinion on this point.

I agree with my learned brother in that present appeal must be allowed and that the judgment of the District Munsif should prevail.

A. S. V.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE RAMESAM.

Ummathu

... *Appellant* (Plaintiff).

v.

Pathumma and anothers

... *Respondents* (Defts 1 to 4).

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Limitation Act, Ss. 4 and 14—Suit filed after the period of limitation in a wrong court on the re-opening day—Proper court re-opening on the same day—Plaint subsequently returned by the wrong court for presentation to the proper court—Subsequent presentation to the proper court—Suit not in time—Scope of S. 4, Limitation Act

The last day for presenting the plaint in a suit was 30—12—1917 on that day the Court of the Subordinate Judge at Cochin in which the plaint ought to have

¹ S. A. No. 1105 of 1920.

23rd February, 1921

1. (1920) 39 M. L. J. 438.

2 (1916) 30 M. L. J. 415.

been presented was closed for the Christmas holidays. On the 3rd January, 1918 the date on which that court and the court of small causes, Cochin re-opened, the plaintiff presented her plaint in the small causes court. The plaint was returned for presentation to the proper court on the 6th February, 1918 and the plaint was presented in the Sub-Court on the 7th February, 1918. On the question whether the suit was instituted in time, held, that it was not saved by the combined operation of Ss. 4 and 14 of the Limitation Act and it was barred by time.

Although it might be possible to exclude the time between January 3rd and 6th February under S. 14 of the Limitation Act, it cannot operate to revive a claim which became time expired by the plaintiff's failure on 3rd January to institute a suit in a court of competent jurisdiction.

The operation of S. 4 of the Limitation Act cannot be invoked if the holidays precede a period which can be excluded from computation under any other section of the Limitation Act.

For this purpose, it makes no difference that the same judge presides over the Sub-Court and the Small Causes Court or even that the same ministerial officer is deputed to receive plaints on the original as the small cause side, because S. 33 of the Small Causes Courts Act declares that the Small Causes Courts are different courts for the purposes of that Act and the Civil Procedure Code.

Second appeal against the decree of the District Court of South Malabar in A. S. No. 503 of 1919 preferred against the decree of the Court of the Subordinate Judge of Cochin in O. S. No. 11 of 1918.

P. G. Krishna Aiyar for Appellants.

T. S. Viswanatha Aiyar and *P. R. Narayana Aiyar* for Respondents.

The Court delivered the following

Judgments :—*Spencer, J.* :—The plaintiff had 3 years from the death of her husband to institute this suit for dower. As he died on 30th December 1914, the last day for presenting the plaint was 30th December 1917.

She actually presented it on January 3rd 1918 in the Small Causes Court of Cochin, that being the day when that Court re-opened after the Christmas holidays. The plaint was returned for want of jurisdiction on February 6th, as suits by a Mahomedan for dower are excepted from the cognizance of a Court of small causes by S. 15 (1) and article 36 of the second schedule of the Provincial Small Causes Courts Act. The Plaintiff represented the plaint on the following day in the court of the Subordinate Judge of Cochin.

The question is whether the suit was in time. It would have been in time if it had been instituted on January 3rd as the Sub Court of Cochin was closed on December 30th when the period of limitation prescribed by the first schedule of the Limitation Act for such suits expired and it re-opened on

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January 3rd. The explanation to S. 3 shows that a suit can be said to be instituted when the plaint is presented to the proper officer. This also is the view taken in *Haridas Roy v. Sarat Chandra Deo* ¹, by a Bench of the Calcutta High Court. The proper officer in this case was the Subordinate Judge of Cochin sitting on the Original Side or the chief ministerial officer of his court authorised under R. 14 of the Civil Rules of Practice to receive plaints. The plaint was not so presented till February 7th when more than 3 years had elapsed from the cause of action arising. The plaintiff wishes to have the benefit of S. 4 of the Act and she would be entitled to it if she had presented her plaint on January 3rd to the proper officer, seeing that both courts were closed till January 2nd. But a presentation to the wrong officer is not an institution of a suit at all. It has been clearly established by the decisions of *Mira Mohudin Rowther v. Nallaperumal Pillai* ², *Seshagiri Row v. Vajravelayudam Pillai* ³ and *Ramalingam Ayyar v. Subbaier* ⁴ that for the purposes of S. 4 account cannot be taken of the closing and re-opening of any other court than that in which the suit was rightly instituted.

Such being the effect of S. 4 it may next be considered whether S. 14 will avail the plaintiff so as to bring her suit within the limitation period. Under S. 14 it might under certain circumstances be possible to exclude the time between January 3rd and February 6th as being a time when the plaintiff was prosecuting with due diligence another civil proceeding against the same party for the same relief; but even if these were done, it could not operate to revive a claim which became time-expired by the plaintiff's failure on January 3rd to institute a suit in a court of competent jurisdiction. The period allowed by S. 14 cannot be tacked on to the period during which the proper court was closed (See 8 L. W. 256) as the regular suit cannot be treated as a continuation of the Small Cause suit in which the plaint was returned (See *Seshagiri Row v. Vajravelayudam Pillai* ³).

It has been held that the period requisite for obtaining a copy of judgment for the purpose of appealing can be tacked on to the period during which the court that passed the decree appealed against was closed if it was too late to apply for a

1 (1914) 18 I. C. 121

3. (1912) I. L. R. 36 Mad. 482.

2 (1911) I L R. 36 Mad 131.

4. (1918) 8 L. W. 256.

copy on the date when judgment was pronounced (See *Saminatha Ayyar v. Venkata Subba Ayyar*. ¹) thus showing that Ss. 12 and 4 may be combined, this being because S. 4 applies to applications (for copies) as well as to suits. But it is necessary that the appellant should have a subsisting right to appeal when he applies for the copy (See *Tukaran Gopal v. Panduranga Sadaram* ² *Venkata Row v. Venkatachala Chettu* ³ and *Siyadathunissa v. Muhammad Mahamud* ⁴ and that he should apply on the reopening day (See *Subramanyam v. Narasimham* ⁵).

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But it has never been held that the period which may be excluded under S. 14 can be tacked on to the period when the court having jurisdiction was closed under S. 4. The reason is that the courts are different, and a plaintiff who fails to institute his suit in the court having jurisdiction before the limitation period expires, or on the reopening date, if the period expires during the vacation of that court has no longer a valid and subsisting cause of action.

It makes no difference that the same Judge presides over both courts or even that the same ministerial officer is deputed to receive plaints on the original as well as the small cause side for S. 53 of the Provincial Small Cause Courts Act declares that they shall be deemed to be different courts for the purposes of that Act and the Code of Civil Procedure. Ss. 15—26 of the Code of Civil procedure, which deal with the institution of suits, are thus affected, with the consequence that a suit instituted on the Small Cause side cannot for the purpose of S. 4 of the Limitation Act be regarded as a suit instituted in "the Court" having jurisdiction to hear original suits.

The Second Appeal is dismissed with costs.

Ramesam, J.:—I agree in holding that the second appeal should be dismissed with costs. The facts are stated in my learned brother's judgment and need not be repeated. In deciding that the suit was time barred, the Courts below relied on *Mir Mohudin Rowther v. Nallaperumal Pillai* ⁶ and *Seshagiri Row v. Vajravelayudam Pillai* ⁷. In the first of these cases, the proper court was not closed on the day on which the plaint was first presented. The facts in the second case are not quite

Ramesam,

1 (1903) I. L. R. 27 Mad 21

2. (1901) I. L. R. 25 Bom 584

3 (1905) I. L. R. 28 Mad 452.

4. (1897) I. L. R. 19 All. 342.

5. (1920) I. L. R. 43 Mad. 640.

6. (1911) I. L. R. 36 Mad. 331 and 482

7 (1912) I. L. R. 36 M 482

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similar to the first. As ascertained from the printed papers, it appears that the proper court was closed on the day of the first presentation but had reopened some days before the re-presentation. It may be said that these cases are distinguishable on the ground that, in both of them, the proper court had been open for some days before the re-presentation which is not the case with the appeal before us. But this does not conclude the matter.

I may first clear the ground by observing that the days from 3rd January to 6th February ought to be obviously excluded from computation under S. 14 of the Limitation Act. The only question for consideration is whether the days from 31st December to 2nd January can be excluded in favour of the appellant. It is conceded on all hands that the language of S. 4 enables them to be so excluded, if the plaint is represented on the reopening day where the period of limitation expires on a holiday, or, in other words if the holidays follow any other period that can be excluded from computation under another section such as S. 12 or S. 15. But can the appellant get the benefit of S. 4 if the holidays precede such period? This being the real question, it is necessary to consider only the cases involving the joint application of S. 4 with some other section of the Act relating to computation. First, we have a group of cases relating to the joint applications of Ss. 4 and 12. The appellant relies on *Siyadatun-nissa v. Muhammad Mahinud* ¹ *Tukaram Gopal v. Panduranga Sadaram* ² *Pandarnath v. Shanker* ³ and *Samunatha Ayyar v. Venkatasubba Ayyar* ⁴ and the respondent relies on *Venkata Row v. Venkatachella Chetti* ⁵ *Tanjore Palace Estate v. Andi Ramiah Chetti* ⁶ *Subrahmanyam v. Narasimham* ⁷ and *Masilamani v. Arumugamudali*. ⁸ The case in *Samunatha Ayyar v. Venkatasubba Ayyar* ⁴ cannot help the appellant. In that case the judgment was delivered on the last day before the holidays, at a time when it was impossible to make an application for copies. The Court being closed for the vacation, the application was made on the reopening day and their Lordships held that, it being impossible for the appellant to make an application earlier, the whole time

1. (1897) I. L. R. 19 All. 342

3. (1901) I. L. R. 25 Bom. 586.

5. (1904) I. L. R. 28 Mad. 452.

7. (1920) I. L. R. 43 Mad 640

2. (1901) I L, R 25 Bom. 584.

4 (1903) I L R. 27 Mad. 21.

6. (1911) 11 I C 339.

8. (1920) 12 L W. 460.

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that elapsed between the date of judgment and the date of application must be regarded as time taken for obtaining copies within the meaning of S. 12. They did not invoke the aid of S. 4 (then S. 5 of the Act of 1877) in arriving at their conclusion. If there was a similar disability in applying for copies (which does not appear from the facts) in the cases in *Tukaram Gopal v. Panduranga Sadaram* ¹ *Pandarinath v. Shanker* ². I agree with these decisions also. The actual ratio decidendi of the judgments, how-ever, depends on the use of S. 5 of the Limitation Act of 1877. It was held that an application for copies may be made so long as the right of appeal was subsisting, a proposition with which I agree and that, not only the period following the application for copies but all the prior holidays can be excluded. I do not see any warrant, for the latter proposition, in the Limitation Act unless S. 4 can be construed liberally, as a section generally enabling exclusion of holidays from computation. If such construction is permissible, the qualification that the right of appeal should be subsisting on the date of application is unnecessary. That such a construction cannot be made is clear from the cases in *Venkata Row v. Venkatachella Chetti* ³ and *Tanjore Palace Estate v. Andi Ramiah Chetti* ⁴ and *Subramaniam v. Narasimham* ⁵ and *Masilamani v. Arumugamudali* ⁶ from the cases in *Mira Mohidin Rowther v. Nallaperumal Pillai* ⁷ and *Seshagiri Row v. Vajravelayudaym Pillai* ⁸ from *Sheodas Daulatram v. Narayan* ⁹ and from other cases to be cited below. That being so, I doubt the correctness of the decisions in *Siyadat un-nissa v. Muhammad Mahamud* ¹⁰ and *Tukaram Gopal v. Panduranga Sadram* ¹ and *Pandarinath v. Shanker* ². In passing, I may observe that these cases relate to appeals and in the circumstances of these cases, the delay might have been excused under S. 5-A of the Act of 1877 (S. 5 of the present Act) a course not available for suits. I may also observe that no question relating to S. 12 can arise in the case of suits. Passing on to the joint application of S. 4 with other sections of the Act, I

1. (1901) I. L. R. 25 Bom. 584.

2. (1901) I. L. R. 25 Bom. 586

3. (1905) I. L. R. 28 Mad. 452.

4. (1911) 11 I. C. 339.

5. (1920) I. L. R. 43 Mad. 640.

6. (1920) 12 L. W. 460

7. (1912) I. L. R. 36 Mad. 181.

8. (1912) I. L. R. 36 Mad. 482.

9. (1901) I. L. R. 36 Bom. 268,

10. (1897) I. L. R. 19 All. 342.

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find that it was held in *Bai Hankora v. Masamallu* ¹ (by Jenkins, C. J. and Aston, J.) that S. 4 cannot be tacked on prior to the period of extension given by S. 19. Again the cases of *Makund Ram v. Ramraj* ² and *Ramalingam Ayyar v. Subbier* ³ are on all fours with the present case and are authorities against the appellant. The case in *Abhoya Churn Chukerbutty v. Gour Mohun Dutt* ⁴ also supports the respondents' contention. I agree with them and hold that the suit is barred by limitation.

C. A. S.

Appeal Dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR JOHN WALLIS, CHIEF JUSTICE AND MR. JUSTICE OLDFIELD.

Palaniappa Chetty	... Petitioner * (2nd Respondent
v.	in Appeal No. 98 of 1919 on
	the file of the High Court.)
Subrahmanya Chetty	... Respondents (Appellant and
and others	Respondents 1 and 3 in the
	said Appeal No. 98 of 1919.)

Palaniappa
Chetty
v.
Subrah-
manya
Chetty.

Civil Procedure Code, O. 9, R. 13—Ex parte decree—Application to set aside—Forum—Pendency of appeal from decree—Effect of.

An application to set aside an *ex parte* decree must be made to the Court which passed the decree, even though an appeal against the decree by other defendants is pending in the appellate court.

Sankara Bhatta v. Subraya Bhatta (8) not followed.

Chenna Reddi v. Peddabbi Reddi (6) relied on.

Petition praying that in the circumstances stated therein and in the affidavit filed therewith the High Court will be pleased to issue an order setting aside the *ex parte* decree dated 8th February 1919 passed against the petitioner hereby by the Court of the Temporary Subordinate Judge of Sivaganga in O. S. No. 95 of 1918 pending disposal of Appeal No. 98 of 1919 preferred therefrom to the High Court.

K. Ramachandran and K. S. Lakshmana Iyer for Petitioner.
C. V. Ananthakrishna Aiyar and C. S. Venkatachari for Respondents.

* C. M. P. No. 1152 of 1920.

10th March, 1921.

1. (1902) 1 L. R. 26 Bom. 782.

2. (1916) 14 All. L. J. 310.

3. 1913 8 L. W. 256.

4. (1887) 24 W. R. p. 26 at p. 28.

5. (1907) L. R. 30 M. 535.

6. (1908) 1 L. R. 32 M. 416.

The Court made the following

Order :—This is a petition by the 2nd respondent in this appeal under O. 9, R. 13, C. P. C., to set aside an ex parte decree obtained against him in the lower court in the suit now under appeal, and in support of this application reliance was placed on a decision in *Sankara Bhatta v. Subraya Bhatta* ¹. That was a case in which the application was made after the appeal had been disposed of and the case is, therefore, distinguishable. That case, however, proceeds upon the ground that the filing of the appeal divested the lower court of the power to entertain that application. There was some warrant for that view in earlier decisions at the time when that judgment was given, but the matter has been abundantly considered since and we think it must now be taken as settled, at any rate in all the other High Courts, that the mere filing of an appeal does not take away the jurisdiction of the lower court to entertain such an application as this. We may also observe that the decision in *Ramanathan Chetty v. Narayanan Chetty* ² as to the proper court to which a review application should be made which was relied on in *Sankara Bhatta v. Subraya Bhatta* ¹ was subsequently overruled by a Full Bench of this Court to which I was a party in *Chenna Reddi v. Peddabbi Reddi* ³. This question has been elaborately considered in a number of recent cases *Mathura Prasad v. Ram Charn Lal* ⁴ *Gajraj Mate Tiwarin v. Swami Nath Roy Chowdhury* ⁵ and we are clearly of opinion, on the authority of these decisions and also of the Full Bench decision of this Court in *Chenna Reddi v. Peddabbi Reddi* ³ that this application should have been made to the lower Court and not to this Court. O. 9, R. 13, expressly provides that the party may apply to the Court by which the decree was passed and the petitioners were clearly wrong in presenting their petition to this court pending the appeal and ought to have gone to the Lower Court. In the result the petition will be returned to the petitioner to enable him to take such further action on it as he may be advised. The petitioner will pay counter petitioner's costs.

Palaniappa
Chetty
v
Subrah-
manyia
Chetty.

1. (1907) I. L. R. 30 Mad. 535.

2. (1904) I. L. R. 27 Mad. 602.

3. (1908) I. L. R. 32 Mad. 416 (F.B.)

4. (1915) I. L. R. 37 All. 208.

5. I. L. R. 39 All. 13.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER, AND MR. JUSTICE RAMESAM.

Muthia Chettiar ... *Appellant* (Plaintiff).*

v.

Karuthamada Pillai ... *Respondent (Defendant).*

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Madras Revenue Recovery Act (II of 1864) S. 59—Revenue sale—Suit to set aside—Fraud—Limitation—Starting point.

A suit to set aside a sale for arrears of revenue brought about by fraud and collusion is governed by S. 59 of Madras Act II of 1864. The suit can be brought within six months of the plaintiff having knowledge of the fraud or irregularities in the conduct of the sale.

Venkata v. Chengadu (1) Relied on

Second appeal against the decree of the the District Court of Madura in Appeal Suit No. 827 of 1919 presented against the decree of the Court of the 2nd Additional District Munsif of Madura in Original Suit No. 26 of 1919 (O. S. No. 290 of 1918 on the file of the Court of the District Munsif of Melur at Madura.

A. N. Krishna Aiyangar for Appellant.

K. R. Narayanaswami Aiyer for Respondent.

The Court delivered the following

Spencer, J.

Judgments :—*Spencer, J. :—*The case of *Lingayya v. Chinna Narayana* ² was a Full Bench case upon the applicability of the general provisions of the Limitation Act to the period of limitation for preferring an appeal against orders made under the Provincial Insolvency Act.

It did not purport to decide anything as to the period of limitation provided by S. 59 of the Madras Revenue Recovery Act 1864. *Srinivasa Ayyangar v. Secretary of State* ³ and *Venkata v. Chengadu* ¹ are decisions considered in *Lingayya v. Chinna Narayana* ² and while it may be said the effect of the judgment of the learned Judges, who were parties to this latest Full Bench, was to throw doubt upon the principles upon which the earlier decisions proceeded, the latter, which related to questions of limitation arising out of the Revenue Recovery Act, were not directly overruled.

¹ S. A. No. 1153 of 1920.

20th January, 1921.

1. (1888) I. L. R. 12 M. 168.

2. (1917) I. L. R. 41 Mad. 169.

3. (1912) I. L. R. 38 Mad. 92.

In the Provincial Insolvency Act III of 1907 S. 45 gives 90 days for preferring on appeal to the High Court to a person aggrieved by an order made by a District Judge. S. 59 of Act II of 1864 gives 6 months for a suit in a Civil Court upon a cause of action arising out of proceedings under that Act, the cause of action being that the plaintiff should deem himself aggrieved by those proceedings. In the present case the plaintiff alleged that he was unaware of the sale having taken place till January 30th 1918, and it is difficult to see how it was possible for him to deem himself aggrieved before even he was aware of the sale. The language of the two Acts thus is not identical.

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I am of opinion that the authority of *Venkata v. Chengadu* ¹ *Iswara Pattar v. Karuppan* ² and *Srinivasa Ayyangar v. Secretary of State* ³ is still good on the point that a suit under the provisions of S. 56 of Act II of 1864 must be brought within six months of the plaintiff having knowledge of fraud or irregularities in the conduct of a sale for arrears of revenue. It follows that the Lower Courts were wrong in calculating limitation as running from the date of the sale without permitting the plaintiff to show that he did not become aware of the sale till some date within 6 months before his suit.

The appeal must therefore be allowed and the suit remanded to the court of first instance for disposal on its merits, Costs to abide the result.

Ramesam, J. :—I agree with the order proposed by my learned brother. The Vakil for the appellant concedes and rightly in view of the Full Bench decision in *Venkata v. Chengadu* ¹ that S. 59 of the Madras Revenue Recovery Act is the section applicable to this suit and he does not seek to apply to this case any article of the Limitation Act prescribing a longer period of limitation. If the cause of action in this case can be said to arise on the discovery of the fraud the suit is within time without using any section of the Limitation Act and the question whether the decision in *Srinivasa Ayyangar v. Secretary of State* ³ is rightly decided or is overruled by *Lingayya v. Chuna Narayana* ⁴ does not arise. That in such cases, the cause of action arose on the discovery of the fraud is the view of Kernan, J. in *Venkata v. Chengadu*.¹ followed

Ramesam, J.

1. (1888) I. L. R. 12 Mad 168

2. (1893) 3 M. L. J. 255.

3. (1912) I. L. R. 38 Mad 92 : 24 M. L. J. 41.

4. (1917) I. L. R. 41 Mad. 169.

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by Collins, C. J. and Davis, J. in *Iswara Pattar v. Karuppan* ¹. I agree with this view. The phrase "cause of action" used in S. 59 of the Revenue Recovery Act has not been defined. It seems to me to cover all the facts necessary to be alleged by the plaintiff for maintaining his action and therefore in cases based on fraud it includes not only the actual transaction by which the plaintiff is aggrieved but the discovery by him of the fraud by means of which the transaction was brought about (See per Bhashyam Ayyanger, J. in *Dampuaboyina Gangi v. Addala Ramaswami* ² citing *Cookes v. Gill* ³.) This is the view of the Legislature as expressed in the 3rd column of Art. 95 of the Limitation Act which is generally a correct description of the cause of action of the suit described in the 1st column.

On this ground I hold the suit is not barred if the plaintiff can prove the fraud alleged and its discovery by him within six months prior to the suit. Costs to abide the result.

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Appcal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE OLDFIELD.

Tellicherry Pichi Naidu

... *Appellant* (Defendant).*

v.

C. Jefferson

... *Respondent (Plaintiff).*

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Lease—Covenant for renewal—Specific Performance—Suit for—Laches—What amounts to—Nature of covenant—Validity—Rule against perpetuities—T. P. Act, S. 14—Applicability.

Plaintiff had a lease of the suit land from the defendant for a period of 5 years on 6-5-03 with a clause entitling plaintiff to obtain renewals on same terms as he might require from time to time. He failed to apply for renewal in 1908, but continued in possession without ever being called upon to take renewal. In 1915 defendant obtained a decree for possession of the land inasmuch as the plaintiff had not taken out a renewal. On 4-11-16 plaintiff called upon defendant to execute a lease for 5 years with the clause for renewal and, on his failure to do so, sued for specific performance. Held that plaintiff's right to enforce the agreement had not been lost by laches and that the agreement was not void as being one in violation of the rule against perpetuities.

The agreement cannot be said to be a transfer of property within the meaning of S. 14 of the T. P. Act read with S. 5 thereof. It is only a covenant to renew at the option of the lessee, a covenant running with the land and not subject to any rule against perpetuities.

* S. A. No. 1721 of 1919.

17th September 1920.

1. (1893) 3 M. L. J. page 255.

2. (1902) 1 L. R. 25 Mad. 736.

3. L. R. 8 C. P. 107.

Second Appeal against the decree of the Court of the Temporary Subordinate Judge of Nellore in Appeal Suit No. 9 of 1919 (A. S. No. 18 of 1919 on the file of the District Court of Nellore) preferred against the decree of the Court of the District Munsiff of Nellore in O. S. No. 1563 of 1916.

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K. Krishnaswami Aiyangar for appellants.

T. V. Ramanatha Aiyar for Respondent.

The Court delivered the following

Judgment:—The plaintiff had a lease of the land in dispute from the defendant for a period of five years for mica mining purposes on the 6th May 1903 with the following clauses: "I bind myself to give you such leases as you may require from time to time after the expiration of this agreement on same conditions. Should I fail to do so, I bind myself to pay you all your expenses that you incur." The plaintiff entered into possession according to the terms of the lease and erected certain structures on the land with a view to carry on the mining operations. But sometime in 1915 the defendant obtained a decree for possession of the land inasmuch as the present plaintiff had not on the expiry of the term mentioned in the lease taken out any renewal. Thereupon the plaintiff called upon the defendant on the 4th November 1916 to execute a lease for five years with the clause for renewal in the terms set out above but the defendant refused to grant any such renewal. The lessee then instituted this suit.

Both the lower Courts have held that the plaintiff is entitled to such a lease as he asked for and gave a decree for specific performance. It was argued before the District Munsiff that the decree in the suit of 1915 operated as *res judicata* but he held that in that suit no question as to the plaintiff's right to renewal was decided and that therefore the present suit was not barred. No argument has been addressed to us on this plea.

Another defence set up was that the plaintiff was guilty of laches in not asking for the renewal of the lease since the expiry of the first term in 1908 until 1916. But then he was in possession and was willing to carry out his part of the agreement and he was never called upon to take a renewal. The lower appellate Court has discussed this question fully and is right in holding that the plaintiff's right to enforce the agreement has not been lost by laches.

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The point, however, which was pressed before us with great persistence was that the agreement was in violation of the rule against perpetuities, as laid down in S. 14 of the Transfer of Property Act. That section enacts the well-known rule that no interest in property can be created to take effect after the life-time of one or more persons living at the date of such transfer, and the minority of some person who shall be in existence at the expiration of that period. The short answer to this agreement is that the agreement in question cannot properly be said to be a transfer of property which is defined by S. 5 of the Act as "an act by which a living person conveys property, in present or in future, to one or more other living persons or to himself and one or more other living persons." Here there is no conveyance of property after the expiry of the term of five years. The agreement in question is only a covenant to renew at the option of the lessee. A covenant like this is a covenant running with the land and is not subject to any rule against perpetuities. In Halsbury's laws of England, Vol. 18 paragraph 935 it is pointed out that a covenant for perpetual renewal is enforceable if the intention in that behalf is clearly shown. The nearest case that has been cited in support of the appellant's contention is of *Kolathu Ayyar v. Ranga Vadhyar*¹ where a contract of pre-emption was held to offend against the rule against perpetuities for it fixed no time within which the agreement to convey was to be performed. Even there the contract was sought to be enforced against the heirs of the person who had entered into it and not, as here against the lessor himself. But apart from that a contract of pre-emption stands on a different footing from a covenant to renew from time to time which has always been recognised both in England and here as a perfectly valid and enforceable contract.

The second appeal must be dismissed with costs.

A. V. V.

Second Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE AYLING, MR. JUSTICE COUTTS
TROTTER AND MR. JUSTICE KUMARASWAMI SASTRI.

Sri Gadadhara Das Bavaji Mahant of *Appellant* * 3rd de-
Balaji Mutt ... *fendant*.

v.

Suryanarayana Patnaik and others ... *Respondents (Plaintiff
and defendants 1 and 2.)*

*Estates Land Act—Ss. 3 (2), (5), (11) ; and 6—Applicability—Minor Inams—
Inamdar under, if a "land-holder" and his tenants if "ryots"—Minor inam
if an "estate."*

The suit lands were originally ryoti lands situated within the permanently settled zemindari of Surangi, an estate within the meaning of the Estates Land Act; they were granted by the zemindar after the permanent settlement in inam on a quit rent payable to himself of Rs. 15 per annum. The grant included both warams. In a suit by the Inamdar to declare that the defendants, tenants under him, had no occupancy rights in the suit lands.

Held by Ayling and Coutts-Trotter, JJ. (Kumaraswami Sastri, J. dissenting) that, in spite of the inam grant, the lands formed part of an "estate", that the plaintiff was a "land-holder" within the meaning of the Act, and that S. 6 thereof operated to give defendants occupancy rights.

The grant in inam is a transfer from the owner within the meaning of S. 3 (5) of the Act, and plaintiff a "land-holder" because he is a person entitled to collect the rents of the whole or any portion of the estate by virtue of such transfer.

The words "such land-holder" in S. 6 mean land holder as defined in the Act.

Appeal under clause 15 of the Letters Patent against the judgment of His Lordship the Honourable the Chief Justice in S. A. No. 859 of 1918, preferred to the High Court against the decree of the Court of the Temporary Subordinate Judge of Ganjam at Berhampore in A. S. No. 20 of 1918, preferred against the decree of the Court of the Additional District Munsif of Berhampore in O. S. No. 284 of 1916.

M. S. Ramanuja Iyengar for C. S. *Venkatachariar* for appellants.

S. Varadachariar and *A. S. Sampathu Aiyangar* for respondents.

The Court delivered the following

Judgments :—*Ayling, J.* :—The suit of which this appeal arises was brought by a minor Inamdar to declare that defendants 1 and 2, tenants under him, have no occupancy right in the Inam lands and to set aside an attachment of the said lands effected by 3rd defendant on the ground that they possessed such a right.

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The sole question is whether the suit lands form part of an "estate" and whether plaintiff and defendants 1 and 2 occupy the position of "land-holder" and "ryot" within the meaning of the Madras Estates Land Act. If they do, S. 6 of the Act will operate to confer occupancy right on the defendants.

The suit lands were originally ryoti lands situated within the permanently settled Zamindari of Surangi, which is an estate within the meaning of the Act: they were granted by the Zamindar after permanent settlement on a quit-rent payable to himself of Rs. 15 per annum. The grant is found, as a fact to include both varams.

The learned Chief Justice has held that in consequence of the Inam grant, the Act is not applicable to such lands, the Inamdar not being a "land-holder" within the meaning of the Act. Sadasiva Iyer, J. on the other hand, considers the Inamdar to be a land-holder, and holds that in spite of the grant the lands still form part of an estate, and that S. 6 operates to give defendants occupancy right.

I have considered with great care and respect the reasoning of the learned Chief Justice, especially as regards the intention of the framers of the Act: but both on the ground of authority and of the provisions of the Act as they stand, I am constrained to take the opposite view.

The suit lands admittedly, but for the grant in Inam, would fall within clause (a) of S. 3 (2) of the Act. As regards the definition of the "land-holder" it may be conceded at once that so long as the Zemindar reserves to himself a quit-rent, the Inamdar cannot be regarded as the owner of the lands in the ordinary legal meaning of the term. But the definition of the land-holder includes "every person entitled to collect the rents of the whole or any portion of the estate by virtue of any transfer from the owner," and I think the grant in Inam must be regarded as such a transfer. A certain difficulty may arise, where as in the present case, the grant was of both varams: this I shall consider later. But where the grant is only of the melvaram, I do not see how a Court can refuse to treat it as a transfer by the owner of the right to collect the rent of the whole or any portion of the estate to which it relates: and whatever may have been the intention of the Legislature we have to deal with the Act as it left their hands. This is the view taken in a series of cases before this Court starting with

Appalanarasimhulu v. Sanyasi ¹. The difficulty referred to by the learned Chief Justice as regards the definition of rent is dealt with by Sundara Iyer, J. in that case : and I entirely agree with his view. The rent which the Inamdar is entitled to collect by virtue of his Inam grant is identical with the rent which was lawfully payable to the Zemindar before the grant and with all respect to the view of my Lord the Chief Justice, I think the significance sought to be placed on the words "in his estate" in the definition of rent is misplaced. Among later cases in which the same view is taken I may quote *Chippurapalli Appayya v. Ramachandra Raju* ² *Venkanna v. Sri Raja Rama Row* ³ *Doddampudi Venkatrayudu v. Bikkina Subbarayudu* ⁴ and a recent unreported case (S. A. No. 1169 of 1917). We were referred to two cases *Gajapathi Maharaja Garu v. Sondi Prahlada Buiyoti Ratno* ⁵ and *Idubilli Syyaddi v. Sri Rajah Viswasvara Nissanka* ⁶ in which a service Inamdar is said to have been treated as the tenant of the Zemindari but in neither of these cases did the question before us arise for consideration. The suits turned on the nature of the Zemindar's power of resumption.

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The learned vakil for respondents, however, seeks to fall back on the possible ground of distinction that in this case the grant is found to be of both warams : and he argues that the Zemindar should consequently be held, by virtue of the Inam grant to have admitted the Inamdar as a ryot of his own. This argument has occasioned me some doubt, but I have come to the conclusion that it really makes no difference. This was the view taken in S. A. No. 1169 of 1917 above quoted : and *Lakshminarasimham Panthulu v. Sree Sree Ramachandra Maharaja Deo* ⁷ and *Tallapragada Subba Row v. Gopiseti Narayanaswami Naidu Garu* ⁸ further tend to support it.

We must assume that at the time of the Inam grant, the lands were either lying waste or were cultivated by a mere tenant at will; in any case there was no one in possession whose occupation could not be terminated at the pleasure of the Zemindar or his grantee. What was the effect of the grant ? It seems to me it was to place the Inamdar in the same position as his grantor,

1. (1913) I. L. R. 38 Mad. 33

2. (1914) 27 M. L. J. 490

3. (1914) I. L. R. 38 Mad. 1155.

4. (1918) M. W. N. 643.

5. (1914) M. W. N. 179.

6. (1915) 18 M. L. T. 142.

7. (1912) I. L. R. 37 Mad. 319.

8. (1916) 31 M. L. J. 339.

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subject only to the liability to pay quit-rent which prevented him from being viewed as an owner of an "estate." He could deal with the land exactly as the Zemindar could before the transfer—either cultivate it himself, or admit somebody else as a tenant under him. If as in the present case he adopted the latter course, he placed the tenant in exactly the same position as the Zemindar would have done, if the admission had been by him. If he cultivated the land himself this would not alter its character as ryoti land or affect the consequence of any subsequent admission as a tenant. In fact, when we say that the grant was of both warans, we merely mean that the right of the grantee in respect of the lands were not limited by the necessity of respecting the rights of any person possessed of the kudivaram at the time of the grant.

I think this view is supported by the amendment to the Act in respect of the definition of rent effected by Act IV of 1909. As S. 2 (11) originally stood, rent for the purpose of a number of sections of the Act dealing chiefly with recovery included "(c) quit-rent, jodi, poruppu and the like payable by an Inamdar as such to the land-holder." By the amending Act this clause was omitted. No explanation is afforded by the preamble : but it seems to me that the Legislature could only have intended deliberately to take away the power specifically conferred on a landholder by the Act as it was originally enacted, to treat his Inamdar as if he were a ryot in respect of the realization of quit-rent.

I may add that the view I am inclined to take does not seem to me to involve any practical inconvenience, or to run counter to the general policy of the Act. One of the main objects of the latter was to confer definitely occupancy right on all tenants of ryoti land, whose claim to the same was previously only presumptive. It is difficult to see why such persons should be less entitled to such a benefit because the right to collect rent from them had been transferred by the Zamindar to an Inamdar.

One more argument calls for brief consideration. The learned vakil for the respondent drew attention to the words "in the estate of such land-holder" in S. 6 (1) and argued that they exclude the cause of a ryot admitted by an Inamdar, who was not the owner of the estate although a land-holder within the definition of S. 3. I think this difficulty is only imaginary.

The section is not happily framed whatever be its meaning : but I feel no doubt that the words referred to " in the estate of such land-holder " simply mean " in the estate of which he is treated for the purpose of this Act as the land-holder."

Since writing the above, my attention has been drawn to the possible contingency of a grant of the class we are dealing with being made to a person who is already at the time of grant in possession of the Kudivaram right. The anomaly of such a case is more apparent than real. It would be pedantry to speak of the grant as a transfer to the ryot of the right to collect rent from himself : it is simply a concession to him of a portion of the rent which he was previously liable to pay. He was a ryot with occupancy right before the grant and his position is not affected by the grant : vide Explanation to S. 6 of the Act.

I would allow the Letters Patent Appeal and dismiss the suit with costs of 3rd defendant throughout.

Coutts Trotter, J. :—I regret very much that, owing to the divergences of judicial opinion, first between the Chief Justice and Sadasiva Ayyar, J. and now between my Lord and my brother Kumaraswami Sastri, J. both of whose judgments I have had the opportunity of perusing, it falls to my lot to give what is in effect the deciding opinion in this case. I regret it because I have had very little experience of the Act and have had very few of its provisions to consider judicially. I do not propose to follow my learned brothers in their exhaustive examination of the material sections and the relevant decisions on the Act, partly because it is no use covering the same ground again and partly because this reference was made with the express purpose of challenging the admitted current of decisions in this Court. On the other hand I do not think it is safe, even where one is prepared to cut one-self adrift from the existing authorities and reconsider the question ab initio, to be guided by speculations as to the supposed general objects of an Act of this nature. Of course there are statutes whose general objects are so plain that one can use them as a guide to reject constructions of ambiguous sections which are possible interpretations of the language of particular sections but obviously opposed to the plain general purpose of the act. But that general purpose, if it is to be used as a guide, must be apparent from the language of the Act itself and it must only be utilised in the

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elucidation of language which is really ambiguous in the sense that, without straining it, can be held reasonably capable of bearing either of the suggested constructions. Speaking for myself, I am unable to gather from the language of this Act any general intention with regard to the position of minor Inamdars; and, consequently, I cannot think that the words of S. 3 (5) can in any legitimate sense be called ambiguous. In my opinion the definition of the word "land-holder" in that sub-section inevitably brings a minor Inamdar within its scope. I cannot see how it can possibly be said that a minor Inamdar is not a person entitled to collect the rents of a portion of the estate by virtue of a transfer from the owner. I quite agree that this undoubtedly has the effect of enlarging the definition of estate in S. 3 (2); but I know of no principle of construction which would justify me in using S. 3 (2) as in any way overriding or controlling what I am driven to regard as the plain meaning and necessary construction of S. 3 (5). Two considerations have, at one time or another, been adduced on the language of S. 3 (5) which were suggested to avoid the construction of which I am in favour. One was based upon the use of the word 'rents' and seems at one time to have found favour with the learned Chief Justice. That was given up before us and admitted to be unarguable. The other argument was that the words in S. 6 "in the estate of such land-holder," must be considered for the purpose of that section as qualifying the definition of 'land-holder' by the previous definition of 'Estate.' I do not regard that either as a reasonable or even possible construction. It seems to me that the words 'such land-holder' can only be construed as meaning "land-holder as defined in this Act." On this short ground I base my agreement with the conclusion of my brother Ayling, J. and I prefer to rest there and abstain from going into the wider grounds covered in the arguments and in many judgments which were cited before us. While I agree generally with the reasoning of Ayling, J. I would be taken as not expressing any opinion as to whether the result does or does not tend to defeat the general purpose of the Act or whether it is desirable or undesirable. To express opinions on these points would require a much greater knowledge not only of the Act but of the conditions of land tenure in this Presidency generally and under the Act than I, as a Judge whose work has been almost exclusively on

the original side of this Court, could possibly pretend to possess. I think that the words of the section can only have one plain meaning ; and I am constrained to give effect to it whether the result is to be welcomed or regretted. If it is to be regretted it can be put right by the legislature. In the result I agree that the Letters Patent Appeal should be allowed and the suit be dismissed with costs of 3rd defendant throughout.

Kumaraswami Sastri, J. :—The question raised in this appeal is whether the provisions of S. 6 clause (1) of the Estates Land Act apply to a post settlement inam of a portion of a village when the grant by the Zemindar to the Inamdar comprises of both the melvaram and kudivaram on a permanent kattubadi so as to confer on the Inamdar's tenants rights of permanent occupancy. The lands comprised in the suit are situate in the village of Thandipuram on the permanently settled Zemindar of Surangi and were granted by a former Zemindar to a predecessor in title of the plaintiff of a fixed kattubadi of Rs. 15 a year. It was found by the Lower Court that the cadjan document which is alleged to contain the terms of the inam grant was not proved to be genuine and that the grant in inam was subsequent to the permanent settlement. These findings were accepted by the Chief Justice and Sadasiva Ayyar, J. The learned Judges agreed in holding that the grant must be presumed to be a grant of the Proprietary right in the suit land including the kudivaram as well as the melvaram interest, but differed as to whether the Estates Land Act was applicable as between the Inamdar and his tenants when the land was situated in a permanently settled estate and consisted of only part of a village and the Inamdar was the owner of kudivaram as well as the melvaram. The Chief Justice was of opinion that the provisions of the Act did not apply to minor inams on the ground (1) that such inams did not fall within the definition of estate in clause 2 of S. 3, (2) that an inamdar was not the owner of the estate, (3) that rent is defined in clause (11) as whatever is lawfully payable to a landlord for the use or occupation of land in his estate and as the estate does not belong to the Inamdar the sum payable by the tenant to the Inamdar cannot be rent within the definition, (4) that the definition of land-holder in clause 5 cannot apply to Inamdars as they are not owners of the estate and as what they collect from tenants is

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not rent within the definition in clause (11), the Inamdar cannot be said to collect rent by virtue of the transfer within the meaning of clause 5 (5), that the Legislature having carefully excluded minor inams from the definition of estates in clause 2 of S. 3, it cannot be reasonably held that, they rendered the definition clause 2 nugatory by defining land-holder in such a way as to include Inamdars. Sadasiva Aiyar, J. while agreeing that a minor inam cannot fall within the definition of estate in clause 2, was of opinion that the definition of a land-holder was sufficiently wide to include minor Inamdars as they owned the part of the village granted to them and collected rents by virtue of the transfer in inam to them. The learned Judge was not prepared to dissent from the series of decisions that took the view that minor darmilla Inamdars were land-holders.

I am of opinion that a minor Inamdar is not a land-holder where the grant to him is of both the Varams.

It is clear that the inam such as the one in suit does not fall within the definition of an estate as defined in clause 2 of S. 3 of the Estates Land Act as it does not come within any of the Clauses (a) to (e). As pointed out in *Narayanasami Naidu v. Subramanyam* ¹ "the definition in sub clause ² (d) was obviously intended to exclude from the definition of 'Estate' what are known as minor inams, namely, particular extents of land in a particular village as contrasted with the grant of the whole village by its boundaries."

In order to bring a minor Inamdar within the definition of land-holder he must either (1) own an estate or part thereof, (2) be a person entitled to collect the rents of the whole or any portion of the estate by virtue of any transfer from the owner or his predecessor-in-title or under any order of a competent Court or of any provision of law.

I do not think the Inamdar like the one in suit can be said to be the owner of an estate or part thereof. In *Maharajah of Vizianagaram v. The Collector of Vizagapatam* ² it was held that grantees holding under perpetual grants subject to the payment to the Zemindar of a small rent under the names of Jodi, kattubadi or poruppu are not owners or proprietors of the land granted to them. • Though the decision was in connection with

1. (1915) I. L. R. 39 Mad. 683 : 29 M. L. J. 478.

2. (1914) I. L. R. 38 Mad. 1128 : 28 M. L. J. 278.

the provisions of the Madras Land Revenue Assessment Act (I of 1876) the reasoning proceeds on general grounds and that ratio decidendi is equally applicable to cases under the Estates Land Act.

The cases under consideration fall under two heads (1) where the grantee is already the owner of the kudivaram and (2) where the land granted was in the absolute disposal of the Zamindar owing to there having been no occupancy ryot on the land at the date of the grant. Where the grantee of the melvaram was himself the occupancy ryot it is difficult to see how the grant of the melvaram interest to him can divest him of that character so as to convert his sub-tenant into permanent occupancy ryots. It is clear that tenants let into possession by occupancy ryots are not governed by the provisions of the Estates Land Act as a sub-tenant of an occupancy ryot is not a ryot within the meaning of the Act which defines a ryot as a person who holds for agriculture ryoti land in an estate on condition of paying to the land-holder the rent which is legally due on it. The whole policy of the Act was to give statutory recognition to the presumption as to the rights of permanent occupancy of ryots in *Zamindaries* laid down in *Cheekati Case* ¹ and to prevent devices whereby the right may be defeated. S. 6 which confers occupancy rights on ryoti land not being old waste expressly provides that a person having a right of occupancy in land does not lose it by subsequently being interested in the land as a land-holder or by subsequently holding the land on ijara or farm.

I think it would be reasonable to hold that the mere fact that an occupancy ryot gets an interest in the melvaram would give sub-tenants (who till then had no rights of occupancy and who could be evicted) rights of permanent occupancy and put the grantee of the melvaram in a decidedly worse position. In all such cases when there is no merger under any of the provisions of the Act the right of the inamdar as an occupancy ryot remains in him, and the effect of his acquiring an interest in the melvaram is not to extinguish his rights as an occupancy ryot and convert him into a land-holder so as to bring his sub-tenant within the provisions of S. 6 cl. (1). *Muthu Reddi v. Muthu Venkatapathi Reddi*, ² and *the Zamindar of*

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1. (1899) I. L. R. 25 Mad. 320.

2. (1916) 31 M. L. J. 854.

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Sanivarappet v. The Zemindar of Vallur,¹ are authorities for the view that the explanation to S. 6 prevents any results that would arise from a merger of the melvaram and kudivaram rights in the same person.

In the second class of cases when the grant is of both warams to the land having been in the absolute disposal of the Zamindar such grants where they are minor inams (or grants of particular extents of land in particular villages as contrasted with grants of the whole village or villages) are in the great majority of cases grants in consideration of services past or future and the objects of the grantor is to allow the grantee to enjoy the lands on favourable terms and not to create minor land-holders. The legislature has therefore been careful in so framing the definition of the word 'estate' as to exclude such minor inamdars and I agree with my Lord in thinking that it could not have been the intention of the legislature which carefully excluded minor inamdars when framing the definition of "estates" to let them in bodily by virtue of a definition of a land-holder a few lines lower down. It is no doubt true that if the plain language of the section leaves one no other alternative the result cannot be helped but in construing the definition of land-holder regard must be had to the definition of estate and any conflict must if possible be avoided. If the primary object in granting minor inams is to confer on the grantee the right to occupy the land permanently at a favourable rate (whether such a rate is called rent or kattubadi) I think the two interests must be kept distinct with the relations between the minor inamdar and his tenants. This distinction is clearly brought out in *Gajapathi Maharaja Garu v. Sondi Prahlada Binoyi Ratho*² and *Idubilly Sryaddi v. Sri Rajali Viswaswara Nissanka*³ where it was held that the resumption of minor inams did not entitle the Zamindar to eject the inamdar from the lands granted. Ayling, J. observed in the former case. "The favourable rate of rent paid by the defendants may be regarded as the recompense for their services: the tenant's profits are the recompense for his labour as a cultivator, and there is no reason why these defendants should be placed in a worse position in the way of permanence of tenure than any other tenant." In Second Appeal No. 986 of 1917 certain lands were granted by the Zemindar of Ettiapuram to one Pettammal and

1. (1915) I, L. R. 39 Mad 944.

2. (1914) M. W. N. 179.

3. (1915) 18 M. L. T. 142.

she granted it as inam to certain josyers from whom 1st and 2nd defendants claimed by right of purchase. The plaintiffs who claimed right to the lands were found by the District Judge to have been in possession for several years as tenants paying rent. It was also found that the original grant was to the land and not of the melvaram only. It was contended in Second Appeal that the plaintiffs were permanent tenants by virtue of S. 6. This claim was disallowed. Spencer, J. observed "Again it is contended that the plaintiffs by being in possession in 1908 when the Madras Estates Land Act came into force must have acquired the status of occupancy ryots under S. 6 of that Act. But they have not shown that the land in dispute was ryoti land not being old waste and that they were paying rent upon it to the land-holder. To assume the latter proposition would involve the finding (1) that Pettammal to whom the Zamindar admittedly made a grant more than 50 years ago was herself a person owning an 'estate' or part thereof within the meaning of S. 3 clause 2 and 5 of Act I of 1908 and (2) that the Zemindar did not grant her kudivaram right."

I may in this connection refer to the explanation to S. 8 of the Estates Land Act (dealing with the merger) which provides that "notwithstanding anything obtained in the section where, before or after the commencement of this Act, the kudivaram interest in any land comprised in an estate falling within clause (d) of sub-S. 2 of S. 3 has been or is acquired by the Inamdar such land shall cease to be part of the estate." It will thus be seen that the legislature in the explanation to S. 6 dealing with cases of the acquisition of the interest in the melvaram by a permanent occupancy ryot and the explanation to S. 8 dealing with the acquisition of an interest in the kudivaram by the inamdar prevented the acquirer in either case from losing his right in the kudivaram by the grant of permanent tenancy to the sub-tenants of the acquirer. It was never the intention of the Legislature that persons who already acquired right of permanent occupancy or who acquired it by virtue of the inam grant should lose the benefit simply because they get an interest in the melvaram as well.

Where the grant is of both the warams or when the kudivaram holder acquires rights in the melvaram it would I think be straining the language of the section to hold that

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the grantee collects rents from himself by virtue of the grant of melvaram. I think the definition of land-holder in S. 3 clause 5 can only be invoked if at all when the transfer of the melvaram is to a person who does not own the kudivaram which is in somebody else. In grants of both the warams in cases of minor inams the object of the grant is to enable the grantee to enjoy the kudivaram rights on favourable terms. If the amount the grantee has to pay can be regarded as a favourable rate of rent or if the effect of the grant cannot be treated as a transfer of the right to collect rent owing to there being no person already paying it whose liability is transferred it is clear from the decision of the Full Bench in *Marina Veerasamy v. Boyinapalli Venkatrayudu*¹ that the tenants of the grantee would not be governed by S. 6 Clause I and acquire a permanent right of occupancy. Remission of rent wholly or in part cannot be said to be the transfer of the right to collect rent and the fact that instead of stipulating for rent the grantor requires payment of kattubadi would equally not be the transfer of the right if at the date of the grant there was no ryot in possession paying rent and it was the grantee who was the person to enjoy the kudivaram either by cultivating the land himself or letting it out to others. If after having got the kudivaram right from the Zamindar the inamdar lets the land to tenants he collects rents not by virtue of the grant of the melvaram right but by virtue of the contract between himself and his sub-tenants just as he would have done if he had been only an occupancy ryot and had sub-let the land.

When a minor inam consists of the grant of both the warams, I think it is against the whole policy of the Act to treat the inamdar as a land-holder and deprive him of the right of enjoying the land to the best advantage either by cultivating it himself or letting it out to others. I am of opinion that where he lets the land to others the section applicable is S. 19 which provides that the relations between a ryot and his tenants or between a land-holder and a tenant of his private land and the rights of any other owners of land are not except as otherwise specially provided in the Act to be regulated by its provisions.

When a minor inamdar has both the warams either by virtue of a grant of the melvaram while he was the owner of the kudivaram

or by virtue of the grant of both the warams to him owing to the land having been at the absolute disposal of the Zamindar at the time of the grant, I agree with my Lord in thinking that he is not a land-holder within the meaning of the Act and that the provisions of the Act do not apply so as to give his tenants occupancy right under S. 6 Clause I of the Act.

The decision of the Chief Justice being in my opinion right, I would dismiss the Letters Patent Appeal with costs.

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Appeal allowed.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE AYLING AND MR. JUSTICE
ODGERS.

Sambasiva Pillai and others ... *Appellants * (De-
fendants 1 and 3.)*

v.

The Secretary of State for India in Coun-
cil represented by the Collector of
South Arcot and another ... *(Respondents Plain-
tiff and 4th defendant.)*

*Hindu Law—Succession—Mitakshara—Right of "Sishya" or disciple—
Sudras.*

The "Sishya" or disciple of a deceased Sudra takes his property as an heir under the Mitakshara Law and prevents an escheat to the Government. The texts of Hindu Law recognising the right of inheritance of a "Sishya" or disciple are not obsolete.

Ramchandra Martand Waikar v. Vinayak Venkatesh Kotliker (1).

Girdhari Lal Roy v. The Bengal Government (2) Referred to.

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Second Appeal against the decree of the Court of the Temporary Subordinate Judge of Cuddalore in Appeal Suit No. 30 of 1918. (A. S. No. 121 of 1916, on the file of the District of South Arcot), preferred against the decree of the Court of the District Munsif of Chidambaram in O. S. No. 140 of 1915.

T. Rangachariar and *C. Padmanabha Aiyangar* for appellant.

The Government Pleader for respondent.

The Court delivered the following

Judgments *Ayling J.* :—This Second Appeal arises out of a suit by Government to obtain possession as an escheat of the

Ayling, J.

* Second Appeal No. 257 of 1920.

28th Jan. and 15th February 1921.

1. (1914) I. L. R. 42 Cal. 384. (P. C.)

2. (1868) 12 M. I. A. 448.

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property of one Shanmuga Yogeswaraswami. The facts found are that the latter was a Sudra ascetic, not entitled to enter the order of Yati or Sanyasi: that the suit property was his secular property, not endowed in favour of any institution: that he died leaving no relations: and that 4th defendant was his chief "Sishya" or disciple. The sole question for our decision is whether the claims of the 4th defendant to inherit as "Sishya" are sufficient to stop the escheat to Government. Both the lower courts decided in favour of Government. Defendants 1 and 3 who have acquired the rights of 4th defendant by purchase, appeal.

Both the lower court's have decided the question as if it were concluded by the ruling in *Dharmapuram Pandara Sannadhi v. Virapandyam Pillai*¹ but as a matter of fact that has no application to the present case. Appellants here reply on the passage in Yajnavalkya ch. 2, 137 and Mitakshara, S. 7 which recognise in ordinary cases of succession the claims of a pupil or fellow student to succeed in default of kindred. The text in Yajnavalkya runs thus:—"The lawfully wedded wife and the daughters also, both parents, brothers likewise, and their sons, gentiles, cognates, a pupil, and a fellow student, on failure of the first among them, the next in order is the heir to the estate of one who departed for heaven, leaving no male issue. This rule extends to all classes." The learned Judges in *Dharmapuram Pandara Sannadhi v. Virapandyam Pillai*¹ on the other hand were considering the applicability of a totally different section of the Mitakshara, S. 8 which is based on Yajnavalkya II, 138, and lays down a special rule of succession to a hermit or ascetic whereby the claims of kindred are dismissed in favour of those of "a preceptor, virtuous pupil and spiritual brother or associate in holiness." This is an exception to the ordinary rule: and it was held in the above quoted judgment that it did not govern the case of a Sudra ascetic. The dispute there was between the spiritual and natural heirs.

What has to be determined here is whether the rule in Yajnavalkya II, 137 which is stated to apply to all classes should be given effect to as against the escheat claim of Government: or whether, as urged by the learned Government Pleader, the rule is obsolete and should be disregarded. I need hardly

1. (1898) I. L. R. 22 Mad. 302.

say that where the meaning and applicability of ancient texts is concerned, I come to a conclusion with great diffidence : but in the present instance there seems to be no doubt as to the meaning of the texts themselves while as to their applicability I am not unfortified by authority and the conclusion to which I feel forced is not so unreasonable, even to western ideas, as it might seem at first sight.

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I have already quoted the text of Yajnavalkya, which, is not only perfectly specific but purports to be of universal application. S. 7 of the Mitakshara is equally clear, quoting Apastamba. "If there be no male issue the nearest sapindas inherit : or in default of kindred the preceptor, or failing him the disciple. If there be no pupil, the fellow student is the successor." And the last paragraph of the section limits the Kings' right of escheat as regards property of kshatriyas or other inferior castes (*i. e.*, non-brahmins) to cases of "failure of all heirs down to the fellow student".

The same section makes it clear (paragraph 2) that in dealing with the case of preceptors, pupils and fellow students, we have only to consider purely religious instruction, a consideration which would largely limit the application and prevent the undesirable extension of the rule. *Vide* also Manu IX, 187 which in dealing with the same point speaks of "the spiritual teacher of the pupil." Having regard to the importance of religious teaching in Hindu ideas, and to the fact that this kind of heirship, only operates on failure of natural heirs, and to defeat the claims of the State, this seems to me to present the rule, in a much less unreasonable and fantastic light, than one might be at first inclined to view it in.

In this connection it may be useful to refer to a passage from a judgment of the Judicial Committee of the Privy Council reported in *Ramachandra Martand Waikar v. Vinayak Venkatesh Kolhekar* ¹. Their Lordships were there dealing with an attempt to secure recognition as heirs of sapinda relations beyond the 5th degree. They say (p. 421) : "It was urged that it is hardly likely Vijnaneswara would give a right of inheritance to a spiritual preceptor or guru before kinsmen, however remotely connected. This argument appears to ignore the peculiar and intimate relationship which their Lordships

1. (1914) I. L. R. 42 Cal 384.

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understand exists in the Hindu system between the pupil and the guru who was to initiate him into the mysteries of the Vedic laws and rites, and under whose roof he has to pass many years of his life. It is easy to suppose that in such circumstances the mystical relationship between a spiritual preceptor and a pupil should be regarded as creating a far closer tie than "remote relationship of blood."

The spirit of these remarks seems to me to militate strongly against any tendency to brush aside appellant's claim as based on an obsolete and unreasonable rule.

In another case *Gridhar Lall Roy v. The Bengal Government*, their Lordships also comment at p. 463 on the extreme jealousy with which the Hindu Law regarded the right of the King to take on a failure of heirs. They quote the provisions of the Mitakshara to which I have referred; and they do so without any suggestion that the rules should not be given effect to.

No doubt the claim is a novel one so far as the courts are concerned. Mr. Mayne in his book on Hindu Law in Paragraph 589 says "I know of no instance in which a claim has ever been set up by a preceptor or pupil to the property of a man dying without heirs" and no case has been quoted to us. But it by no means follows that the rule has not been observed in practice: and I hesitate to treat a clear direction of the texts as absolute and negligible, when it involves no inequity or conflict so far as I know, with even modern Hindu ideas, and when it has been referred to by the highest tribunal in the terms I have quoted.

The learned Government Pleader has drawn our attention to a recent case of this court in which the ancient Hindu Rule disqualifying a person born blind from inheriting was held to be obsolete. I do not find anything in the reasoning of the learned Judges, which bears on the question before us. The learned Vakil for appellants also referred to a case of the Privy Council in *Gunjeshwar Kunwar v. Durga Prashad Singh* ² as throwing doubt on the correctness of the decision in that case.

On the best consideration I can give to the matter, I am inclined to think that the old rule appearing in the text should not be treated as obsolete. Its applicability will naturally be closely scrutinised by the courts and strict proof required of the spiritual relationship alleged. But where, as in the present

1. () 12 M. I. A. 448.

2. (1917) I. L. R. 45 Cal. 17.

case, that is clearly established, I can see no reason for refusing to give effect to it.

I would allow the appeal and dismiss the suit with costs throughout.

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Odgers, J. :—This appeal concerns the property of a certain Sudra ascetic, Shanmuga Yogeswara Swami by name, who died without heirs or relations in the ordinary sense of those words. The property of the deceased is claimed by the appellant who was a 'disciple' of the deceased and by the Government as escheat. The lower courts have held that the Government is entitled, hence this Second Appeal. The case reported in *Dharmapuram Pandara Sannadhi v. Virapandiyam Pillai*¹ is relied on by both the lower courts. This lays down that a Sudra is unable to enter the order of 'Yathi' or sanyasi and that the ordinary law of inheritance regulates the devolution of his property. There the property was decreed to the secular heir, the brother of the deceased as against the members of the mutt into which the deceased had been admitted. There is no such contest in this case. I am not called upon to decide between a devolution to an ordinary heir *e. g.*, a brother or a son and one to a religious institution. The question is whether a disciple of a Sudra ascetic can be interposed between the deceased and the Government who admittedly take by escheat only in the last resort. It is admitted that there is no decision that the disciple of a Sudra ascetic is an heir and the case is therefore largely one of first impression. The case in *Giyana Sambanda Pandara Sannadhi v. Kandasami Thambiran*² is authority for holding that religious training is not confined to Brahmins and the first authority relied on by the appellant for establishing his right is the first paragraph of Yajnavalkya II 137—139 quoted at page 171 of J. C. Ghose's Book on Hindu Law. It runs as follows :

"The lawfully wedded wife and the daughters also, both parents, brothers likewise, and their sons, gentiles, cognates, a pupil, and a fellow student, on failure of the first among them, the next in order is the heir to the estate of one who departed for heaven, leaving no male issue. This rule extends to all classes."

[Note especially the last sentence]

1. (1898) I. L. R. 22 Mad. 302.

2. (1887) I. L. R. 10 Mad. 375.

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"The heirs to the property of a hermit, of an ascetic, and of a student in theology are in order (that is in the inverse order) the preceptor, a virtuous pupil, and a spiritual brother and one belonging to the same hermitage."

The second paragraph admittedly cannot apply as a Sudra cannot be an ascetic. *Dharmapuram Pandara Sannadhi v. Virapandyam Pillai* ¹. Cf. also Colebrooke's Digest of Hindu Law Vol. 2 page 522 for the former of these texts and page 577 for the second. Similar quotations are given from Yajnavalkya.

In Setlur's Law of Inheritance, from the Mitakshara, page 36, it is stated that the rule of Yajnavalkya must be understood as extending to all castes; at page 48, it is stated: "If there be no Bandhus of the deceased, the preceptor, or on failure of him the pupil inherits under the text of Apastamba (II 6-14-2-3). cf. also Sacred Books of the East, Vol. II, page 133. In the Laws of Manu Chap. IX. S. 187 (Sacred Books of the East Vol. 25 page 366) it is stated: "Always to that (relative within three degrees) who is nearest to the (deceased) sapinda, the estate shall belong, afterwards a *sakulya* shall be (the heir, then), the spiritual teacher or the pupil."

Sir Thomas Strange in his Book on Hindu Law, Chap. VII puts it thus: "In default of natural kin, the series of heirs, in all the classes, that of the Brahmin excepted, terminates with the preceptor of the deceased, his pupil, his priest hired to perform sacrifices, or his fellow student, each in his order; and, finally, failing all these, the lawful heirs of the Kshatriya, Vaisya, and Sudra, are learned and virtuous Brahmins—a description, however special, yet too comprehensive to be consistent with the right of escheat, for want of heirs, in the King; and, therefore, it has been narrowed, in construction, to such as reside in the same town or village."

It was laid down by the Privy Council in *The Collector of Masulipatam v. Cavalry Venkata Narainappa* ² that the Mitakshara is the highest authority on Inheritance for this Province. Their Lordships say at page 525: "But when it is made out clearly that by the law applicable to the last owner, there is a total failure of heirs, then the claim to the land ceases (we apprehend) to be subject to any such personal law." They proceed at page 526: "In the present case, if the Hindu Law had expressly provided that, upon the death of a Brahmin, without

¹, (1898) I L. R., 22 M. 302.

². 8 M. L. A. 500.

heirs, ordinarily so-called, his property should pass to some definite person or class of persons; if for instance, it admitted, in the case of a Brahminical succession, collaterals more remote than it would admit in the case of succession to a Sudra, there would be ground for excluding the title of the Crown, because there would, by Hindu Law be some person in the nature of an heir capable of succeeding; but there the Sudder Dewany Adawlut rests its decision on what it terms 'the primary declaration of Manu that the property of a Brahmin shall never be taken by the King,' It is therefore established in my opinion, that there is on the authority of the texts quoted above, a rule of Hindu Law that the property of a person such as the deceased should pass to a definite person or class of persons by the personal law of the deceased. The case in *Gridhari Lall Roy v. Bengal Government* ¹ is also authority for saying that the Mitakshara recognises the interposition of three classes of heirs, viz., preceptor, pupil, and fellow student between the relatives of the deceased and the King.

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In *Ramachandra Martand Waikar v. Vinayek Venkatesh Kothekar* ² a case before the Privy Council, their Lordships say (P. 406) "It is to be remarked, as has been observed in previous cases before this Board, that the Hindu Law contains its own principles of exposition, and that questions arising under it cannot be determined on abstract reasoning or analogies borrowed from other systems of law, and must depend for their decision on the rules and doctrines enunciated by its own law givers and recognised expounders." Again after noticing the argument that it is hardly likely that Vijnaneswara would give a right of inheritance to a spiritual preceptor or guru before kinsmen however remotely connected, their Lordships remark "This argument appears to ignore the peculiar and intimate relationship which their Lordships understand exists in the Hindu system between the pupil and the guru who has to initiate him into the mysteries of the vedic laws and the rites and under whose roof he has to pass many years of his life. It is easy to suppose that in such circumstances the mystical relationship between a spiritual preceptor and a pupil should be regarded as creating a far closer tie than remote relationship of blood" (page 421). The answer to this argument is that the rule of law and text on which it is based is obsolete and

1. (1868) 12 M. I. A. 448 at page 463. 2. (1914) I. L. R. 42 Cal. 384.

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that in the absence of proof of a special custom it is impossible or impracticable to apply it. The texts are also said to be too indefinite and vague. Reliance is placed on the text of Vrihaspati 25 (cf Ghose, page 175) "Should a Kshatriya, Vaisya, or Sudra die without leaving male issue, or wife, or brother, their property shall be taken (as escheat) by the King, for he is the lord of all." The objection to this view is that Vrihaspathi has admittedly nothing like the same authority as the Mitakshara, which as pointed out above, has been laid down by the highest judicial tribunal as being the authority for the Hindu Law of Inheritance in this part of India. There is also the objection that Vrihaspati does not enumerate all heirs, bandhus etc. I do not think it is impossible to apply the text at least to a disciple. I admit greater difficulty in the case of a "fellow student" in modern days. It is not disputed that the appellant was a Sishya or student of the deceased and this was so found by the learned Subordinate Judge. With regard to the question of the rule of inheritance being obsolete, reference was made to *Surayya v. Subbamma* ¹. In that case it was held that the rule which prevents a person "born blind" from claiming a share in his ancestral property was obsolete having regard to present day circumstances and modern methods to enable the blind to at any rate, partially overcome their defect.

However in *Gunjeshwar Kunwar v. Durga Prasad Singh* ² it was held that blindness, to exclude from inheritance must be congenital, adopting the statement of law in Rajkumar Sarvadhikari's Hindu Law of Inheritance page 956. Apparently the attention of the learned Judges of this Court was not called to this authority when they decided *Surayya v. Subbamma* ¹. In any case, the Privy Council has upheld the rule of Hindu Law as far as congenital blindness is concerned. Further, the Full Bench case of *Rajani v. Nitai* ³ is authority for saying that a rule (in that case also a rule of inheritance) cannot be said to be obsolete merely because there is no occasion for its application. The application of a rule like that under discussion must of necessity be extremely rare, but I have already stated that in my opinion its application when necessity arises is neither impossible nor impracticable. It seems to me that where we have, as I think we have here, a

1. (1919) I. L. R. 43 Mad, 4.

2. (1917) I. L. R. 45 Cal, 17 (P. C) •

3. (1920) 32 Cal. L. J. 383.

clear rule of inheritance deducible from the ancient Hindu authorities which is generally recognised and supported by the highest judicial authority in recent times (Cf. *Ramachandra Martanda Waikar v. Vinayek Venkatesh Kothekar*¹) it cannot be laid that the rule is obsolete because there happens to be no judicial decision exactly in point. For all these reasons I would allow the appeal and dismiss the suit throughout with costs.

A. V. V.

Appeal dismissed.

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Odgers, J.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR JOHN WALLIS, CHIEF JUSTICE AND MR. JUSTICE OLDFIELD.

Jayanti Venkayya and another ... *Appellant** *Defendants* 1
and 2)

v.

Damisetti Sathiraju and others ... *Respondents (Plaintiffs and*
6th and 5th defendants.)

C. P. C., O. 34, R. 5—*Decree absolute—Application for—Starting point—Appellate preliminary decree—Date of—Limitation Act, Art. 181.*

The starting point of limitation for an application for a decree absolute under O. 34, R. 5 C. P. C., is, under Art. 181 of the Limitation Act, the date of the preliminary decree of the appellate court, and not that of the preliminary decree of the original Court. For the purposes of such an application the appellate decree supersedes the original decree, whether the appellate court varies the decree of the lower court or merely affirms it.

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and others.

Appeal against the Final decree of the court of the Subordinate Judge of Cocanada dated 21st August 1919 in O. S. No. 17 of 1914.

P. Somasuudaram for appellants.

B. Satyanarayana for 1 to 5 Respondents.

K. Ramamurthi for 7th Report.

The Court delivered the following

Judgment:—This is an appeal from the judgment of the Subordinate Judge's Court of Cocanada in a mortgage suit and a question of some importance has been argued before us by Mr. Somasundaram as to whether the starting point for an application for a decree absolute under O. 34, R. 5, C. P. C., which is governed by Art. 181 of the Limitation Act is the date of the original decree or the date of the appellate decree which affirmed the original decree.

* Appeal No. 88 of 1920.

22nd February, 1921.

1. (1914) I. L. R. 42 Cal. 384.

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Sathiraju
and others.

It had long been regarded as well-settled in this court that the starting point under Art. 181 was the date of the appellate decree, and there is a decision of the Privy Council in *Bhup Indar Bahadur Singh v. Bijai Bahadur Singh*¹ which strongly supports that view. In that case the District Judge passed a decree giving the plaintiff possession with future mesne profits. That decree was set aside by the High Court and was restored, after a great many years, by the Privy Council. The question then arose in execution as to the date from which mesne profits should be calculated under the provisions of S. 211 of the old Code (Act XIV of 1882) and their Lordships observed at page 158: "The Court is now executing, not the District Judge's decree of 1887, but the Queen's Order of 1895, which by affirming the District Judge's decree has adopted its terms and has carried on their effect down to a later date." Those observations of the Privy Council are entirely in accordance with what has till recently been the established view in this Court. If the date of the final decree was the proper date to have regard to for the purpose of S. 211, C. P. C., it follows that it is equally the proper date to have regard to with reference to an application for a decree absolute under O. 34, R. 5.

We have, however, been asked to hold that this authority should be disregarded on the authority of a more recent decision of the Privy Council in *Juscurn Boid v. Prithichand Lal Choudhury*² and certain observations of Seshagiri Ayyar, J., one of the learned Judges who decided *Viswanatha Sastri v. Sitalakshmi Ammal*³ which go to support this contention. Those observations were *obiter* because both the learned Judges concurred in holding that the case was governed by Art. 182 the general article relating to execution. We have carefully examined *Juscurn Boid v. Prithichand Lal Choudhury*² and have come to the conclusion to which we have referred. In the recent case an auction purchaser sued to recover from certain decree-holders his purchase-money in consequence of the sale being set aside. Assuming that Art. 97 was the article applicable, the Privy Council held that consideration failed when the sale itself was set aside in the first court, that time then began to run under Art. 97 and that consideration did not fail

1. (1900) I L. R. 23 All., p. 152.

2. (1918) I L. R. 46 Cal., 670.

3. (1920) 13 L. W. 37.

afresh when the order setting aside the sale was affirmed by the appellate court. Here, as in the well known case in *Basu Kuar v. Dhum Singh* ¹ the question their Lordships had to decide was when the consideration in fact failed ; once that was established the application of article 97 was clear. With reference to this question they observed in accordance with the express provisions of the Code that an original decree is not suspended by presentation of an appeal nor is its operation interrupted where the decree on appeal is one of dismissal, but those observations must in my opinion be considered as inapplicable to questions arising under Arts. 181 and 182. By article 182 the appellate decree is expressly made a fresh starting point for purposes of execution, and an appellant is not required to proceed with the execution of a decree against which he has appealed while the appeal is pending on pain of becoming barred if he does not. It would be strange if a different rule were applicable under Art. 181 as regards applications for a decree absolute where the preliminary decree is under appeal, an application so much resembling an application for execution that under the repealed chapter of the Transfer of Property Act it was held by this Court to be one. That was a question which their Lordships were not considering.

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The view that for the purposes of such an application the appellate decree supersedes the original decree appears to be in accordance with the earlier decision in *Blup Indar Bahadur Singh v. Bijai Bahadur Singh* ² where their Lordships held that the decree that they were executing was the decree of the appellate Court. Applying that to the present case, the preliminary decree which is being executed must be held to be the preliminary decree passed by the appellate Court. It would obviously be so if the decree of the appellate Court had varied the preliminary decree passed by the lower court, and there are no good reasons for applying different rules as regards questions arising under Art. 181 when the appellate Court affirms the decree of the lower court and when it varies it. Consequently an application for a decree absolute has to be made under Art. 181 within three years from the passing of the preliminary decree by the appellate court, and, therefore, the present application was in time and the objection fails.

1. (1888) I. L. R., 11 All 47.

2. (1900) I. L. R., 23 All. 152.

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The other objection which was taken is an objection to the preliminary decree which has already been confirmed by this court and cannot be now questioned.

Objection has then been taken that the legal representative of the 4th defendant who was one of the representatives of the original mortgagee was not brought on in time. We think that, in the circumstances, if that is so, the delay should be excused.

The appeal accordingly fails and is dismissed with costs.

A. V. V.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE AYLING AND MR. JUSTICE KRISHNAN.

Jainulabdin Sahhib

... *Appellant* * (*Defendant*).

v.

Krishna Chettiar

... *Respondent* (*Plaintiff*).

Jainulabdin
Sahib
v.
Krishna
Chettiar.

Civil Procedure Code, S. 47—Suit by judgment-debtor for possession of properties alleged to have been wrongly delivered in execution—Stranger purchaser—Suit if maintainable.

A claim by the judgment-debtor under a mortgage decree, for the recovery of properties alleged to have been wrongly delivered in execution to the court auction purchaser, comes within S. 47 of the C. P. Code, even though the purchaser was a stranger to the mortgage suit. The remedy of the judgment-debtor is by an application under S. 47 C. P. Code and not by a suit.

Veyindramulhu Pillai v. Maya Nadan (1) explained.

Second Appeal against the decree of the District Court of South Malabar in Appeal No. 394 of 1919, preferred against the decree of the Court of the Additional District Munsif of Palghat in Original Suit No. 44 of 1919 (O. S. No. 482 of 1916 on the file of the Court of the Principal District Munsif of Palaghat.)

K. P. M. Menon and *N. A. Krishna Iyer* for Appellant.

K. V. Krishnaswami Aiyar for Respondent.

The Court delivered the following

Krishnan, J.

Judgments :—*Krishnan, J.* :—The point taken before us in this Second Appeal for the defendant-appellant is, that the plaintiff's suit is barred by S. 47 Civil Procedure Code, his only remedy being an application under that section. It was not taken in the Lower Courts but as it is a question of law arising on the facts found, we have allowed it to be raised.

* S. A. No. 1214 of 1920

15th February 1921.

1. (1919) I. L. R. 48 Mad. 107 : 38 M. L. J. 32 (F. B.)

The facts relevant for the argument are these. One Rangan Pattar obtained a mortgage decree against the plaintiff; the properties were sold in Court auction and one of the items was purchased by the present defendant who was a stranger to the mortgage suit and to the decree. A sale certificate was issued to him and he obtained a delivery order. In execution of that order he got possession of plots A, B and C. This was about 11½ years ago. It is the plaintiff's case that plot C alone was included in the decree and in the sale certificate, and was delivered to the defendant, and that the defendant subsequently trespassed on the plots A and B which are the subject matter of the present suit; he now sues to recover them. The defendant pleaded that all the plots were included in the Court sale and in his certificate, and that he got possession of them all properly through court and that he was entitled to them. The Lower Courts have found that the alleged trespass is untrue and that the plaintiff's plots were delivered to the defendant by the Court amīn. They have however also found that plots A and B were not really included in the mortgage deed or in the decree or in the sale certificate or in the delivery order, which all contained the same description of the property as to boundaries and measurements. The amīn's mistake in delivering them to the defendant arose from a mistake in the measurements in the documents and the plots really belonged to the plaintiff. Applying article 144 of the Limitation Act, the lower Courts held that the plaintiff was not barred by limitation and gave him a decree for the plots.

Mr. Menon for the defendant-appellant contends that on the finding, this is a claim by the judgment debtor under a mortgage decree for the recovery of property overdelivered in execution to the court auction-purchaser, and, as such, this is a case to which S. 47 Civil Procedure Code applies even though the purchaser was a stranger to the mortgage suit. He urges that the present suit is thus barred by the section and should have been dismissed. If the section applies there can be no doubt that the plaintiff's claim must fail whatever the merits may be, for the suit cannot be treated as an application under S. 47 clause (2) with any advantage as it will then have to be dismissed *in limine* as barred by limitation.

To make S. 47 applicable it is clear from its language that two conditions are necessary to be fulfilled. The question

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raised must be one relating to the execution, discharge, or satisfaction of a decree, and it must also be one arising between the parties to the suit or their representatives. On the authorities in this Court, the first condition must be held to be satisfied in this case. See *Venkatachalapathy Aiyar v. Perumal Aiyar*¹ and *Kathirayasami Naicker v. Ramabhadra Naidu*.² In the latter case the second condition was also fulfilled as the parties to the application for redelivery were the judgment debtor on one side and the decree-holder purchaser on the other. In the present case we have a stranger purchaser. Mr. Menon contends that this will make no difference, that the stranger-purchaser should be looked upon as the representatives of the decree-holder in this matter, and that whether he be such representative or not the case falls under S. 47 Civil Procedure Code under the recent ruling of the Full Bench in *Veyindra Muthu Pillai v. Maya Nadan*³. In the Full Bench case the question arose in three appeals two being between one V. Pillai, a stranger purchaser in execution of a money decree on one side, and one Maya Nadan the decree-holder-purchaser of some of the items under the mortgage decree on the other side, and the third appeal being one between the same Veyindra Muthu Pillai and one Subbaya Nadan a stranger purchaser of other items in execution of the same mortgage decree. On the question of the representative character of these stranger-purchasers there was a difference of opinion between the members of the Bench. The learned Officiating Chief Justice was of opinion that the question whether such a purchaser was the representative of the judgment-debtor or of the decree-holder depended on the nature of the question raised and on who the contesting party was. See page 124. He adopted the view stated in *Krishna Bhupathi Devu v. Vikrama Devu*⁴ that such a purchaser represented the judgment debtor to the extent of the property purchased, and the decree-holder so far as his right to bring to sale such property in execution of the decree was concerned. So that according to his view, the purchaser in asking for delivery of possession or in resisting re-delivery would be a representative of the decree-holder. His view on this point was, however, not adopted by the majority who held that such a purchaser was the represent-

1. (1912) M. W. N. 44.

2. (1918) 45 Indian Cases 608.

3. (1919) I. L. R. 43 Mad. 107.

4. (1894) I. L. R. 18 Mad. 13 at P. 18.

ative of the judgment-debtor only, and never of the decree-holder. I must follow the view of the majority on this point whatever my own view may be. There was a considerable conflict of opinion on the point in this High Court previously, and it was to settle the question that the reference was made, and we must take the Full Bench decision as settling it. I am not therefore referring to the previous authorities.

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On the first part of his contention Mr. Menon cannot therefore succeed, as on the view above stated, his client will be a representative of the plaintiff-judgment-debtor and the question here will thus be one between a party and his own representative. See *Gour Mohun v. Dinonath Karmokar* ¹. It is however suggested by him that the Full Bench did not consider the question of the representative character of the mortgage-decree purchaser which is the point before us, but confined itself to that of the money decree purchaser, and that there is a difference between the two kinds of purchasers in the matter. The last question referred to the Full Bench specifically raised the question as to the mortgage decree-purchaser, See page 113, and though Oldfield, J. has not answered the question, the other Judges have dealt with it and have made no distinction between the two. Taking the view of the Full Bench regarding the money-decree purchaser, I think no proper distinction can be made on the point between him and a mortgage-decree purchaser. S. 89 of the Transfer of Property Act, under which the order absolute for sale was made in the present case, declares that, on such an order being made, the right to redeem and the security shall both be extinguished. Thereafter there is only a right to sell the property, just as there is after attachment under a money decree, See *Het Ram v. Shadi Ram*, ² and the rights flowing from the purchase are the same. The fact that as a matter of equity the purchaser under a mortgage decree is allowed under certain circumstances to plead the mortgagee's right in the property purchased as a shield has no bearing on this question.

The Full Bench however went further and held on the authority of the P. C. decision in *Prosunno Kumar Sanyal v. Kali Das Sanyal* ³ that irrespective of any question of the representative character of the auction-purchaser-applicant,

¹ 1. (1897) I. L. R. 25 Cal. 40.

² (1918) I. L. R. 40 All 407.

³ I. L. R. 19 Cal. 683.

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S. 47 Civil Procedure Code should be applied to his case where the question raised is one relating to execution, and is one in which the decree-holder and the judgment-debtor are adversely interested. Seshagiri Aiyar, J. put it thus : "What the court have to see is whether the issues arising for decision relate (a) to execution and (b) to deciding rival rights of the decree-holder and the judgment-debtor in the subject matter. If those conditions are satisfied, the fact that others are interested in the result of the decision should not affect the jurisdiction and competency of the executing court to deal with the matter." On this point the Full Bench were unanimous, and it was, I think, on the application of this view that the case between the stranger money-decree purchaser, Veyindra Muthu Pillai and the stranger mortgage-decree purchaser Subbaya Nadan was held to fall under S. 47, C. P. C., the question of delivery of property purchased in court sale being evidently held to be one relating to execution and one in which the decree-holder and the judgment-debtor were adversely interested. It is statedly on this view that Oldfield, J. thought it unnecessary to answer the last question referred to the Full Bench. This is made further clear by the subsequent judgment of the referring judges reported in *Veyindra Muthu Pillai v. Maya Nadan* ¹. They applied S. 47 to all the 3 cases. Except on this view, S. 47 Civil Procedure Code could not well have been applied in Subbayya Nadan's case, as he would be the representative only of the judgment-debtor, Veyindra Muthu Pillai the other party to that application. I am unable to accept the suggestion that S. 47 was applied to that case by oversight. The Full Bench as I understand them hold that the condition in S. 47 C. P. C. that the question should be one "arising between the parties" is satisfied by the question being one of a nature in which the parties to the suit are adversely interested, though the person actually raising it in any particular case against one party may not be the representative of the other party. In fact they gave an extended meaning to these words.

Applying this view to the present case we have to see whether the question raised here is one in which the rival rights of the decree-holder and the judgment-debtor have to be decided. In the Full Bench case the application was for delivery of

1. (1920) I. L. R. 43 Mad 696 : 39 M. L. J. 456.

properties included in the decree and purchased in court sale. That question was treated as falling within S. 47 even where the purchaser was a stranger. The present case no doubt refers to property claimed by one side to be included in the decree and denied by the other side to be so included and found by the court to be not so included. Does that make a difference? I was at first inclined to think that it did and that the decree-holder was not interested in the present controversy, as it refers to property over delivered to the purchaser. But on further consideration I have come to the conclusion that it is not correct. If the decree-holder can be held to be interested in the delivery of the property included in the decree to the purchaser as was done by the Full Bench I think we must hold consistently with that view that he is also interested in the questions as to what properties that decree covered. The mistake in the boundaries in the present case is not merely in the delivery order but also in the mortgage deed and in the decree and in the sale certificate, and if the decree or the sale certificate had been asked to be rectified on the point, the question would clearly have arisen between the parties to the suit. The fact that it is now raised against the purchaser should not make any difference as to whether it is to be done in execution or not. It is clearly appropriate that these mistakes in execution proceedings should be rectified by the executing court itself, and we should not put too narrow a construction on S. 47 and drive parties to suits for the purpose. If plaintiff in the present suit loses his property on this view it is only due to his own laches in delaying for so many years.

I would therefore hold S. 47 Civil Procedure Code applies to the present case, and as the result I will allow the Second Appeal and dismiss the suit, but, in the circumstances, without costs in any of the courts.

Ayling J :—I am not prepared to dissent from my learned brother's view of the meaning of the Full Bench judgments in *Veyindra Muthu Pillai v. Maya Nadan*¹ and although they seem to me to extend the applicability of S. 47 Civil Procedure Code to a degree hardly suggested by the wording of the Section I feel bound to follow them.

I concur in the order proposed.

A. V. V.

Second appeal allowed.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE

NAPIER.

Pulpati Hanmayya

... Appellant * (Petitioner
Creditor)

v.

Ravuri Ramayya and anothers ...

Respondents
(respondents 1 to 3 are
debtors.)

Hanmayya

v.

Ramayya.

Ayling, J.

Provincial Insolvency Act (V of 1920) S. 78—Discretion given by—Applicability—Application under old Act (III of 1907)—Pendency of, at date of new Act—Effect.

An application by a creditor under the Provincial Insolvency Act, 1907, to adjudicate the debtor as an insolvent was held rightly dismissed by the Lower Court because the application was made more than 3 months after the date of the commission of the act of Insolvency.

The fact that such an application was pending when the new Act (V of 1920) came into force cannot make it one under the new Act so as to make S. 78 of the new Act applicable to it.

The discretion given to the court by S. 78 of the new Act cannot be extended to applications made under the old Act.

Appeal against the order of the District Court of Guntur dated 23rd July 1920 in I. P. No. 1 of 1920.

C. Sambasiva Rau, for Appellant.

B. Satyanarayana, for Respondents.

The Court delivered the following

Judgment :—That right to apply to the Court (given by the Provincial Insolvency Act, III of 1907 to the creditor) to adjudicate the debtor as an insolvent was not exercised within the period of three months (from the date of the commission of the act of insolvency) allowed under that Act. The application under that Act was made after the expiry of that period and was properly dismissed as the applicant had no right to make the application under that Act at the time he made it in the proper Court.

It is argued that as the application was pending when the new Act V of 1920 came into force and as that Act contains a provision (S. 78) giving a discretion to the Court to allow an extension of the period prescribed for making applications under the Act, and to excuse the delay in presentation, the District Judge ought to have exercised that discretion in favour of the

* A. S. O. No. 240 of 1920.

24th January, 1921.

appellant (Petitioner) and accepted his application as a valid one.

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Ayling, J.

It is difficult to follow the argument. An application made statedly under the Act of 1907 which could be made only under that Act on its date (the date of the application) cannot be considered to be an application under the new Act of 1920, merely because it was pending disposal when the new Act came into force. The discretion given to the court by the Legislature statedly in respect of applications *under the New Act* cannot again be extended to applications made under the old Act. The provisions of S. 6 clauses (b) and (c) of the General Clauses Act, X of 1897, are also against the appellant's contention. The case in *Jogodanund Singh v. Amrita Lal Sircar*¹ was decided on the consideration that S. 310-A Civil Procedure Code which was introduced as an *addition* to the Civil Procedure Code was not affected by the corresponding provisions of the old General Clauses Act as the enactment of the said S. 310 A was a mere addition to the existing Civil Procedure Code that is, there was no enactment repealing the existing Civil Procedure into which S. 310 A was introduced.

We therefore dismiss the appeal with costs.

A. S. V.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE AYLING AND MR. JUSTICE COUTTS TROTTER.

Ramappa

... *Appellant* * (*Plaintiff*.)

v.

Abdulla Beari

... *Respondent* (*Defendant*).

Landlord and tenant—Institution of suit for rent—Recognition of tenancy—Waiver of forfeiture—Right of tenant to the value of improvements—Customary law of South Canara.

Ramappa
v.
Addulla
Beari.

A landlord who sues his tenant for rent cannot be heard to say that there was no valid or subsisting lease during the period for which he sues for rent. He will also be deemed to have waived any cause of forfeiture existing up to the end of the period for which he sues for rent.

Ayling, J.

Dendy v. Nicholl 2. Referred to.

Under the customary law of South Canara a tenant is entitled to the value of improvements effected by him on ejection by the landlord.

Daramma v. Mariamma 3 followed.

* S. A. No. 997 of 1920.

1920 December, 20.

1. (1895) I L. R. 22 Cal. 767. (F. B.)

2. 4 C. B. (N. S.) 376

3. 24 M. L. J. 397.

Ramappa
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Ayling, J.

Second Appeal against the decree of the District Court of South Kanara in appeal suit No. 321 of 1919 preferred against the decree of the Court of the District Munsif of Kasargod in Original Suit No. 258 of 1918.

K. P. Lakshmana Rau for appellant

H. Balakrishna Rau for respondent

The Court delivered the following.

Judgment :—In this case the learned District Judge has decreed a suit for possession subject to the evicted tenant being awarded compensation for an improvement made by him on the property. The tenant was in under a registered Chalgeni chit or yearly lease executed on the 4th September 1915. It appears to be common ground that the term according to that chit came to an end on the 10th March 1916 and the improvement in question which, is chiefly a house, was admittedly built after the termination of the Chalgeni chit. But it was built while the tenant was holding over and that holding over was subsequently recognised and legalised by the landlord, because in his plaint he sues for the rent for 1917 and the rent for 1918 and it has been clear law for a very long time that a landlord who recognises a term even by suing for the rent, let alone accepting it, cannot be heard to say that there was no valid subsisting lease during the period for which he sues for rent. Moreover he will be deemed to have waived any cause of forfeiture existing up to the end of the period for which he sues for rent. Vide *Dendy v. Nicholl* ¹. By the Transfer of Property Act S. 116, where the lessor assents to the lessee's holding over, the tenant should be deemed to be a tenant from year to year and in this case the landlord has signified his recognition of it by the demand for rent.

The next point taken is this, that the provisions of the Transfer of Property Act apply which would give the tenant only the right of removing the superstructure that he put upon the land and not any right to compensation. As against that, it is said that the customary law of Kanara is that the tenant has not merely the privilege of removing the improvements where they are severable but is entitled to leave them on the land and to be paid compensation by the landlord. The

1. 4 C B. (N B.) P. 376.

leading case on the subject is *Daramma v. Mariamma* ¹. It is quite true, as pointed out by Mr. Lakshmana Rao, that this is a case not of a lessee but of a mortgagee in possession. But not only do we see no logical distinction between the two cases because the principle is that the landlord should not get the benefit of what he has not paid for and reap what others have sown but it is clearly regarded in the judgment in that case as being exactly on the same footing for both tenants and mortgagees. In fact the argument there seems rather to have been. "We agree that this law applies to tenants but we contend that it does not apply to mortgagees."

Ramappa
v.
Abdulla
Bari.
—
Ayling, J.

As a last point, it is said by Mr. Lakshmana Rao that this is not an improvement for which he is liable. The only one as to which the question arises is this house. It does seem a little strong to say that you cannot have a garden without a house for people to live in and look after it and the other reason given by the District Judge that the garden will have the benefit of the house and the rubbish etc., is obviously unreasonable. But it may be that there are gardens for the proper cultivation of which it is essential that somebody should live there and therefore there must be a house: This is a finding of fact and we think therefore that this appeal fails and must be dismissed with costs.

A. V. V.

Second appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

PRESENT :—SIR JOHN WALLIS, CHIEF JUSTICE, MR. JUSTICE OLDFIELD AND MR. JUSTICE KUMARASWAMI SASTRI.

Baluswami Aiyar ... *Appellant.* (Defendant).*

v.

Lakshmana Aiyar and others ... *Respondents.*

Specific Relief Act, S. 15—Specific performance—Agreement to sell an item of joint family property—Agreement not binding on the other members—Whether agreement falls under the terms of S. 15.—Terms on which specific performance will be decreed.

F. B.
—
Baluswami
Aiyar,
v.
Lakshmana
Aiyar,
and others.

A coparcener who agrees to convey an item of family property for purposes personal to himself and not binding on the other coparceners cannot perform his contract in its entirety within the meaning of S. 15 of the Specific Relief Act and

* O. S. Appeal No. 21 of 1918.

22nd February 1921.

1. (1914) 24 M. L. J. 397.

F. B.
—
Baluswami
Aiyar,
v.
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Aiyar,
and others.

the case therefore falls within the operation of the first portion of that section. *Kosuri Ramaraju v. Ivalury Ramalingam* (1) and *Srinivasa Reddi v. Sivarama Reddi* (2) overruled.

In such a case, Specific performance can be decreed only if the plaintiff is willing to take a conveyance of the share of the coparcener on the date of the contract and is willing to pay the full amount of consideration. *Subbarami Reddi v. Vadlamudi Seshachallam* (3) and *Nagiah v. Venkatarama Sastrulu* (4) approved.

On appeal from the Judgment and decree of the Honourable Mr. Justice Coutts Trotter dated the 21st day of February 1918 passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court in C. S. No. 182 of 1917.

A. Krishnaswami Aiyar and M. Subbaraya Aiyar, Vakils for the appellant.

The Honourable the Advocate General and K. S. Jayarama Aiyar, Vakils for the respondents 1 and 2.

A. Krishnaswami Aiyar N. Chandrasekara Aiyar for 3rd respondent.

The Court (Chief Justice and Krishnan, J.) made the following.

ORDER OF REFERENCE TO A FULL BENCH:—

Wallis, C. J. *The Chief Justice*:—The facts have been fully set out in the Judgment of Coutts Trotter, J. and again by my learned brother. After hearing the case very fully argued I am unable to differ from the finding of the learned Judge that the 2nd defendant's consent to the contract of sale entered into by his father has not been proved. T. V. Subbaiyan, the second witness examined for the plaintiff on commission merely speaks to the 2nd defendant's presence at a meeting at Madura when the sale was discussed, but admittedly no agreement was come to with the 1st defendant on that occasion. He does corroborate the 1st plaintiff's statement that at that meeting the 2nd defendant consented to the sale for not less than Rs. 30,000. It is said for the plaintiffs that when the agreement was concluded in Madras a telegram mentioning the fact was sent to 2nd defendant, but the telegram has not been produced as it might have been. All that P. W. 3 says is that such a telegram was written out and given to the 1st defendant to send. It is not shown that it was ever sent. I agree with the learned trial Judge that the consent of the 2nd defendant has not been proved.

The next question is whether the 1st defendant as managing member of a joint trading family consisting of himself and

1. (1902) I. L. R. 26 M. 74.

2. (1908) I. L. R. 82 M. 320.

3. (1909) I. L. R. 38 M. 359.

4. (1912) I. L. R. 37 M. 387.

the 2nd defendant had power to sell without the 2nd defendant's consent the suit house. The case now made for the plaintiffs is that the joint family of the 1st and 2nd defendants advanced money to one Kuppusami in the course of the money lending business carried on by them and that the suit house was acquired by them as the readiest means of realising their debt, and that in these circumstances it was within the power of the managing member of the joint family as an incident of the joint family business to reconvert the property so acquired into money for the purposes of the joint family business. Coutts Trotter, J. regards this as tantamount to saying that the old rules of Hindu Law as to the alienation of family property have no application to trading families. I am not prepared to go so far. It may be that the purchase and resale of immoveable property may be an incident of a joint family business, and as such an incident within the competence of the managing member of the family without the consent of the other co-parceners, and my learned brother has called my attention to a recent decision of the Allahabad High Court in *Pahal Wan Singh v. Jiwan Das*¹ which appears to support this view. No attempt was made by the plaintiffs to support the suit contract on his ground either in the plaint or in the issues, and in these circumstances I am not prepared to differ from the conclusion of the learned trial Judge that it is not shown that the facts of the present case bring it within the proposition. As I have already said this question was not raised in the pleadings or issues. If it had been, we might have had much fuller evidence as to the nature of the business carried on by the defendants' family and the circumstances which led the 1st defendant to enter into the suit-contract. In the present state of the pleadings and evidence I am not prepared to hold that the facts necessary to raise this question have been established. In other respects also, I agree with the conclusions of my learned brother.

Krishnan, J. :—This is an appeal by the 1st defendant against the judgment of Coutts Trotter, J. in a suit brought by the plaintiffs to enforce specific performance of a contract to sell a house and ground in Madras made by him with them and in the alternative for damages. His son the 2nd defendant was not a party to the contract and did not sign it but he was

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added as a party defendant as the plaintiffs claimed that the contract was nevertheless binding on him on two grounds namely that he assented to it and authorised his father to sell the whole property including his own share and that the father himself had authority under the Hindu Law to sell the whole property as the sale must be taken to have been for the purpose of a family trade carried on by him for the benefit of the family. These pleas were denied by the defendants and the learned trial Judge has held that they have not been established and has dismissed the suit against the son. The 1st defendant also raised some pleas against the validity of the agreement in so far as he was concerned but they were rejected by the trial judge and have not been raised again before us and it is not therefore necessary to state them in detail. The contention of the plaintiffs that the property was the self-acquisition of the father was also rejected by the trial Judge and it is also not now raised before us. The learned Judge gave a decree against the 1st defendant directing him to convey the whole property including the son's half share in it to the plaintiffs on their paying the balance of the purchase money due. In appeal it is contended before us that on the finding of the learned Judge the contract was not binding on the 2nd defendant, no decree for specific performance should have been passed at all even as against the 1st defendant, the plaintiff's remedy, if any, being only a claim for damages and that in any event the decree for specific performance should have been confined to the first defendant's half share in the property under S. 15 of the Specific Relief Act.

The plaintiffs, whilst maintaining that the decree of the learned Judge was right in law on the findings have further tried to support that decree, by attacking the finding against the binding character of the agreement on the son. They are clearly entitled to do so under O. 41, R. 22, Clause (1) of the Code of Civil Procedure and we must consider the correctness of that finding even though the plaintiffs have not appealed themselves. The son had not been made a party to the appeal in which the finding in his favour has been attacked and if in his absence from the record we were to differ from the trial Judge, it would lead to the anomaly of there being conflicting findings on the same point in the same case as between plaintiffs and 1st defendant on the one hand and between them and the 2nd defendant

on the other hand. We therefore acceded to the application of the plaintiffs that the 2nd defendant should be added as a party respondent to enable him to be heard in support of that finding and to bind him by our own findings. He was accordingly made a party respondent and has been heard by us in appeal.

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It was contended that we had no power to add him as a party to the appeal as he was not interested in the result of the appeal and that O. 41, R. 20 did not apply to this case. The words of that rule are however wide enough to cover the present case; but even if they were not our powers to add parties in appeal are not exhausted by that rule as O. 1 R., 10 also applies to appeals by force of S. 107 of the Code of Civil Procedure. In the present case it is manifestly desirable to have the 2nd defendant before us to enable us properly and effectually to settle the question whether the plaintiff's agreement is binding on him or not, a question which we have to decide in any case for the disposal of the 1st defendant's appeal. We must now consider that question.

As already stated the agreement to sell is sought to be made binding on the son on two grounds. Taking the first ground alleged namely that he had assented to the 1st defendant selling the whole property and had authorised him to sell it, I am not prepared to differ from the view taken by the learned trial judge that there is not sufficient reliable and relevant evidence on record to support a positive finding in plaintiff's favour on the point. Both the defendants deny any such assent or authorisation and the most that the plaintiffs have been able to prove is that the 2nd defendant knew of the negotiations for sale and that he remained silent without objecting to the sale of his share. I am not able to hold that mere silence in such circumstance can be held to amount to assent in law as there was no legal duty on his part to interpose. On the other hand the attempt on the plaintiffs' part to obtain his consent after the contract was concluded, which failed would seem to show that there was no real antecedent consent by him and that the plaintiffs understood this. It is not necessary to deal with this point at length as I agree with the judgment of the trial Judge on it; and the plea based on 2nd defendant's assent or authorisation by him must thus be rejected.

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The next question is whether the agreement can be held to be binding on the son on the 2nd ground alleged namely that it was entered into by the father as the manager of the family trade of money-lending and for the purpose of carrying on that trade for the benefit of the family. The argument is set out in detail in the judgment under appeal. It raises an important question as to how far the ordinary rule of Hindu Law that a managing member of a joint Hindu family cannot deal with joint-family property by himself except for a family purpose and for the necessity or benefit of the family, should be modified and extended in the case of trading families. Chandavarkar, J. has discussed this question at some length in *Raghunathji Tarachand v. The Bank of Bombay* ¹ and has held that in the case of trading families "a trading purpose or purpose incidental to it must be treated as a family purpose" within the rule above stated. A similar view has also been taken in Allahabad very recently in *Pahal Wan Singh v. Jivan Das*. ² Though I am inclined to follow this view it is not necessary to discuss and decide the question in this case as I consider plaintiffs have failed to allege and prove the facts necessary to raise it.

Assuming in the plaintiff's favour that they have shown that the 1st defendant did carry on a family trade of money-lending, they have further to show that the plaintiff agreement was connected with that trade. No doubt they now allege that the defendants purchased the property to liquidate a debt due to their money-lending business, which otherwise could not have been recovered and that the subsequent arrangement to sell it was for the purpose of getting the cash back for the business. This suggestion looks plausible but as pointed out by the learned trial judge there is no reliable evidence enabling us to come to a positive conclusion on the point in plaintiff's favour. It was not contended that there was any pressure for cash in the money-lending business at the time of this agreement; the learned Advocate General for the plaintiffs merely suggested that it would be important for a money-lending business to have its assets in a liquid form. This may be so, but from mere general considerations of the kind we cannot draw the inference that the present sale was for any trade purpose. Defendants

1. (1910) I. L. R. 34 Bom 72.

2 (1919) I. L. R. 42 All. 109.

deny that it had anything to do with any money-lending business and point out that if the idea was to reconvert immoveable property into cash for money-lending purpose the 1st defendant would not have waited so long to do it as he did, the agreement to sell having been entered into a considerable time after the purchase. Except that for the purchase some money due to the business by one of their debtors, the original owner of the property, was taken as part of the purchase money there is nothing to show that the property was treated and kept as part of the assets of the business or was used for its purposes. There is thus nothing to connect the agreement to sell with any purpose connected with the trade. Defendants deny that there was any such connection and in the absence of reliable evidence on the point on plaintiffs' side we must hold that it is not proved that the plaintiff agreement was entered into for any trading purpose; on this finding the question of Hindu Law argued does not arise. Both the grounds alleged for making the contract binding on the 2nd defendant thus fail and we must accept the view of the learned Judge that it is not binding on that defendant.

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We have thus before us a case of a managing member of a joint Hindu family entering into an agreement to sell an item of family property, which is not proved to be binding on the other members. Can a decree for specific performance be given against him in such a case; and if so what should be the form of the decree? Different opinions have been expressed on this question by different benches of this Court. See *Kosuri-Ramaraju v. Ivalury Ramalingam* ¹, *Srinivasa Reddi v. Sivarama Reddi* ² *Subbarami Reddi v. Vadlamudi Seshachallam Chetty* ³ *Nagiah v. Venkatarama Sastrulu* ⁴ *Davvur Subba v. Venkatarami* ⁵. In view of this difference of opinion in the above cases and of the general importance of the question it seems desirable to have it settled by a Full Bench. I would therefore refer the following question to the Full Bench :—

Where the managing member of a joint Hindu Family enters into a contract to sell an item of family property and that contract is not proved to be binding on the other members

1. (1902) I L. R. 26 Mad, 74.

2. (1908) I. L. R. 32 Mad. 320.

3. (1909) I. L. R. 33 Mad 859.

4. (1912) I L. R. 37 Mad 387.

5. (1914) I. L. R. 38 Mad. 1187.

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can specific performance of it be decreed against him and if so on what terms ?

A. Krishnaswami Aiyar and N. Sivaramakrishna Aiyar for M. Subbaraya Aiyar for the appellant.

The decisions establish two propositions. A member of an undivided Hindu family contracting to sell an item of family property for no necessity or justifiable purpose binding on the family, cannot at all perform any portion of his contract ; consequently specific performance of the contract should not at all be decreed against him. If specific performance could be decreed at all the decree should be for a conveyance of the vendor's share in the item on payment of entire consideration for the contract, purchaser waiving compensation under S. 15, Specific Relief Act. No decree for specific performance can be passed against a member of a joint family but there can only be a decree for damages. A member of an undivided Hindu family has no disposable interest.

The object of a suit for specific performance is to create a legal title and not to create a mere equity and a purchaser from coparcener of family property is only the precarious holder of a mere equity, the holder of a right in personam. The decisions have established that the right of a purchaser is only an equity and it is only a personal equity. An alienee from such a purchaser has been held not entitled to ask for equitable adjustment. Any member so long as the family is undivided cannot specifically perform because he cannot assure a legal title. The decision of Sankaran Nair, J. in 38 M. 1187 supports the first proposition. Even in the case of a perfected alienation the purchaser gets no legal title but is merely the holder of an equity ; *Nanjaya Mudali v. Shanmuga* ¹. The Law views with favour a perfected alienation but equity will not create a mere equity. The distinction between an executory contract and a perfected alienation is therefore vital. It is otherwise in English Law where even an agreement to convey an undivided interest severs the joint tenancy. Further no decree ought to be given because it would be prejudicial to third parties as it would enable the plaintiff, a mere stranger to disturb the joint family status against the will of the other members of the family.

Even under English Law which is more lenient than S. 15 no specific performance could be decreed even in cases where there was some fixed determinable interest in the property. The cases fall into three classes (a) No decree for specific performance at all. *Thomas v. Dering* ¹. The general principle is laid down at page 743. No specific performance where it would lead to a breach of trust where defendant is in a fiduciary capacity. This principle applies *a fortiori* to the present case. The manager of a joint Hindu family is in a fiduciary capacity with regard to the other members. *Annamalai v. Murugesu* ²; 39 All. 437; 47 L. J. Ch. 53 and *Thomas v. Dering* ¹ decide that even with reference to the beneficial interest of defendant no specific performance ought to be decreed.

Even where there was no complication of trust specific performance has been refused where the property is indivisible *Price v. Griffith* ³ and 1895 I. Q. B. 683.

S. 15 Specific Relief Act does not exclude the possibility of applying the rule in 1895 I Q. B. 683. Reference was made to 53 I. C. 283 at 287.

(b) Specific performance without compensation has been given as under S. 15 in 19 Beav 576 and 34 Beav 611.

(c) Specific performance with compensation has been given in a third class of cases where there has been some fraudulent representation or some inequitable conduct on the part of the vendor. *Castle v. Wilkinson* ⁴; 9 Ch. D. 180; *Hooper v. Smart* ⁵, *Hexter v. Pearce* ⁶, *Rudd v. Lascelles* ⁷, and *Rutherford v. Acton Adams* ⁸.

Hindu Law says that a member of an undivided family cannot alienate any specific item as his own. If S. 15 has to be applied to Hindu joint families, "can" in the section must be interpreted according to Hindu law. The Privy Council in 5 Bom. 48 deprecated the principle of logically extending the doctrine of alienability of undivided property. 5 B 48 shows that the law even as to perfected alienations has been merely the growth of Equity. *Nanjaya Mudali v. Shanmuga* ⁹, *Maharaja of Bobbili v. Venkataramanjulu* ¹⁰, *Khota Bhalabadra Das*

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1. 1 Keen 729.

3. 1 De G. M. 80 : 43 E. R. 482.

5. 18 Eq. 683

7. (1900) 1 Ch. 815.

9. (1913) 25 M. L. J. 576 : 38 M. 684.

2. (1903) 1 L. R. 26 M. 544 at 553.

4. 5 Ch. App. 534.

6. (1900) 1 Ch. 341.

8. (1915) A. C. 866.

10. (1914) 39 M. 265 : 27 M. L. J. 409.

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v. *Khetra Das* ¹ lay down that an alienee has no rights in rem but only right in personam to work out his rights in a suit for partition properly brought. He has no right to possession. 43 M. 309 lays down that the doctrine of equitable allotment of substituted property recognised in 38 M. 684 does not extend to a court purchaser: 39 M. L. J. 706: 44 M. 167 shows that it does not extend to an alienee from such purchaser.

[*Chief Justice* : The principle of substitution of one property for another property is itself unsound.]

A. K. Iyer : On principle it is unsound where a specific item is alienated. But decisions have now recognised this principle *Nanjaya Mudali v. Shanmuga* ² and *Rangayya Reddy v. Subramania Aiyar* ³. No member of an undivided family can give a legal title to a specific item without the concurrence of the other members. *Ayyagari v. Ayyagari* ⁴, *Vitla Buthen v. Yamenamma* ⁵. Attachment of a member's undivided interest in a specific item has been held to be bad. 10 L. W. 449.

In *Gurusami Sastri v. Ganapathi Pillai* ⁶ the English doctrine of no specific performance where breach of trust would result has been applied to a Hindu family. Specific performance was decreed as to a half on payment of half the purchase money.

[*Oldfield, J.* :—The contract in *Gurusami Sastri v. Ganapathi* ⁶ was dated 2-10-1876. Therefore the Sp. Rel. Act of 1877 was not considered at all in that case.]

In 26 M. 74, S. 15 has not been considered. In 32 M. 320 S. 15 was considered but is in direct conflict with *Subba v. Venkatarami* ⁷. Sankaran Nair, J. has in 38 M. 1187 changed his earlier view. His later view is the more considered one and ought to prevail.

In 33 M. 359, S. 16 was held inapplicable as the contract in the case was a single and indivisible contract and S. 15 applied. In *Nagiah v. Venkatarama* ⁸ and *Govinda v. Apat-sahaya* ⁹ S. 15 has been applied but I submit that even under S. 15 the Court has a judicial discretion to refuse a specific

1. (1916) 31 M. L. J. 275.

3. (1917) I. L. R. 40 M. 365.

5. 8 M. H. C. R. 6 at 11.

7. (1914) I. L. R. 38 M. 1187.

9. (1912) I. L. R. 37 M. 403.

2. (1913) 25 M. L. J. 576 38 M. 684.

4. (1902) I. L. R. 25 M. 690, 717, 18.

6. (1882) I. L. R. 5 M. 337.

8. (1912) I. L. R. 37 M. 387.

performance where litigation would necessarily be the result of the decree and where third parties would be thereby prejudicially affected.

Subba v. Venkatarami ¹ lays down that no decree for Specific Performance at all should be granted and distinguishes the earlier cases when specific performance was held to be possible on the ground that they proceeded on the earlier view that a coparcener can alienate a specific item of family property which view has been definitely adandoned after 38 M. 684.

A purchaser is merely the holder of an equity hedged in with innumerable limitations. It is conjectural and speculative. Such a thing is not contemplated in "can perform" in S. 15.

In 40 Mad. at 370 and 375 this view in *Subba v. Venkatarami* ¹ is dissented from but no reasons are given for the dissent.

In the alternative I contend that the decree if at all should be for a conveyance of the share of the vendor in the item on payment of full purchase money purchaser waiving claim for damages. Reference was made to. *Poraka Subharami Reddi v. Seshachellam Chetty*. ² 13 A. L. J. 739 : 27 C. L. J. 611.

As to the applicability of the Specific Relief Act to Hindus S. 27 has been applied. 44 B. 967.

That such a decree for a share in the item could be given is established by the Privy Council dicisions in *Deendial's case* ³, *Suraj Buns v. Sheoraj Koer* ⁴, *Hardei Narain v. Ruder Prakash* ⁵.

T. M. Krishnaswami Aiyar (K. S. Jayarama Aiyar with him) for respondent.

I contend that *Kosuri Ramaragu v. Ivalury Ramalingam* ⁶ and *Srinwasa v. Swarama* ⁷ lay down the correct law. The question whether the transaction is beneficial or necessary does not fall to be considered when decree for specific performance in terms of the contract is asked against the promisor alone. The proper decree should be a decree directing the defendant to convey what he has promised namely the entire house and not merely a fraction of it.

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1. (1914) I. L. R. 38 M 1187

2. (1909) I. L. R 33 M. 359.

3. I. L. R. 3 Cal. 198 at 209.

4. I. L. R. 5 Cal. 148 at 175.

5. I. L. R. 10 Cal. 626 at 637.

6. (1902) I. L. R. 26 M. 74.

7. (1908) I. L. R. 32 M 321 330.

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S. 15 of the Specific Relief Act does not apply to the case. S. 15 will apply only where one can predicate with certainty that the vendor is unable to convey the whole. A member of the family can certainly perform the whole contract by conveying the entire item. It is too late in the day to question the alienability of specific family property. The law recognises such a transfer and a contract to sell such property does not fall within S. 15 of the Act. English cases afford hardly any assistance, but even in England the preponderance of authority is in my favour. Fry on Specific Performance para. 1257.

Specific performance can and ought to be decreed of all that the vendor can convey. As a general rule it cannot be stated that a member cannot convey a specific item of family property as his. The value of the specific item may be in some cases considerably less than the vendor's undivided interest in the entire family properties : the item may be only an ordinary piece of land to which no special family importance attaches or it may be a house as in the present case which is purchased by the family in the course of a speculative investment. In all such cases there is no special equity in the other members of the family to deprive the alienee of his item ; as a general rule the property purchased is always allotted to the purchaser. 38 M. 684; 25 M. 690.

The fact that he may not get the property in a partition is no reason for saying that he gets no legal title to the item conveyed.

It is now well established that an alienee gets a right to other properties substituted on partition in place of properties purchased. 38 M. 684 (687) ; 40 M at 370 ; 43 M. 309 at 311. This is only an equitable right. It is wrong to call the purchaser's right a right in personam nor is a suit for partition brought by the purchaser a suit for specific performance. The purchaser's right is a legal title if equity according to the other side will not help a mere equity. This equitable doctrine of substitution comes to the aid of the purchaser and this cannot be unless the purchaser has a legal title. Therefore there is no real objection to the decree for specific performance.

The contention of the other side will revert us back to the ancient days when voluntary alienations were not recognised in this Presidency. It is now well settled that a member of an

undivided family can make three kinds of alienations. (1) his share in the entire family properties, (2) an entire specific property of the family, and (3) his share in a specific property belonging to the family.

S. 15 is not enacted to relieve a promisor of the consequences of his own bargain. It is not intended to be a defence to the vendor because he is a member of a joint Hindu family. The question whether other members will be bound or not by the sale when completed is an entirely irrelevant inquiry when decree is asked for only against the vendor. 40 Mad 365 F. B. prohibits inquiry into extraneous matters and so the only decree should be in accordance with 26 Mad. 74 and 32 M. 320.

Under the English Law, the Courts will decree specific performance unless he is unable to perform the whole of his contract. Where the plaintiff purchaser waives all objections to title, he is entitled to a decree for Specific performance though the Court finds title bad. *Benner v. Fowler*¹, subject as in that case to the plaintiff paying costs of the inquiry as to title. The same doctrine is laid down in Fry on Specific Performance para. 1257.

This rule is a rule of general application and there is nothing in the Sp. Rel. Act to exclude the applicability of such a rule.

The result of the transfer under the decree will be that the alienee is clothed with a right to obtain possession of the property by a suit. No question of champerty can arise in India. S. 18 (b) contemplates a similar case. The vendor is bound in law to obtain the concurrence of the other members to the alienation of the specific item or to obtain the item for the alienee in a suit for partition. This will be the case under S. 18 (b) and under the Hindu Law and according to the decisions the vendor will be compelled to perfect the title before even the decree for specific performance.

Ss. 14-17 apply only where the full contract cannot be specifically performed and the second part of S. 15 like the first part and in no way differing from the first applies only where the defendant is *unable* to perform his part of the contract. The defendant cannot say he is unable when he can be compelled under S. 18 (b) to obtain and deliver exclusive possession of the property to the purchaser.

1. 2 Beav 302 . 48 E. R. 1197.

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(*Sastri, J.*—Suppose the vendor who has contracted to sell joint family property institutes the suit for specific performance. Can specific performance be decreed against the purchaser ?)

Specific performance cannot be decreed because the purchaser cannot be forced to accept a title which is liable to confirmation only after a litigation. But it does not follow that the purchaser's claim for specific performance should be dismissed. The English cases do lay down a distinction between a purchaser's suit and a vendor's suit. As the question of title is one in favour of the purchaser, the purchaser can waive defect and accept whatever title vendor can give.

The Courts certainly do and will compel him to give not merely a piece of paper but also a complete title to the whole on a principle analogous to S. 18 (b) to the extent to which he can give.

(*Sastri, J.*—But there is a clear distinction between an executory contract and a perfected alienation).

No authority is cited in support of the distinction. Cases have decided the other way.

(*Sastri, J.*—But Courts of Equity will not create mere equity.)

That point is decided in my favour in *De Houghton v. Money*¹ where specific performance was granted the result of the decree admittedly being that the plaintiff decree-holder became only entitled to a right to set aside a prior alienation as being fraudulent and void. An equity and equity only was granted by the decree for specific performance in 2 Ch. App. 134 and *Tasker v. Small*² at pp. 68, 69 and 70 ; 40 E. R. 850, 851. The object of the suit for specific performance is to place the party in the same situation as nearly as possible as would be the case, if the contract is voluntarily performed.

The purchaser's interest is a real right and not a mere equity. The case in 1 Keen has no application to this case. The purchaser here does not seek to affect the interest of persons other than the vendor. The decisions in 33 Mad. 359 ; 37 M. 387 ; and 37 M. 403 are bad law after the Full Bench in 40 Mad. 365 and 26 Mad. 74 and 32 M. 320 alone are good law according to 40 M 365 F. B.

(*Sastri, J.* :—If S 15 applies to this case, then the decree should be for vendor's share in the item on payment of whole purchase-money.)

1. 2 Ch. App. 134.

2. 3 Myl. Craig 63.

The result of granting such a decree would be merely to place the vendor in a more advantageous position after a breach of contract than if he had performed it. Supposing on a partition the whole item falls for specific performance will the purchaser who has waived compensation under S. 15 proviso be entitled to call for a conveyance of the other half on the principle of S. 43 Transfer of Property Act? Why should the vendor benefit under such a decree? S. 15 is not intended to have this result.

(*Sastri, J.* :—That is an open question).

The argument on the other side proves too much. Again if the decree could not be granted for conveying the entire item as the vendor's the same objection applies to the granting of a decree for a share alone in the item. Such a share in specific item is not even attachable. *Gangadhara v. Venkatasubbiah* ¹. How then can specific performance be decreed in such a case.

Applying the argument on the other side the result in either case would be to enable a stranger to disturb the joint family status against the will of the other members to confirm only an equity and not a legal title to a share in the item. If the argument on the other side was right no specific performance at all should be granted against a member of undivided Hindu family in any case. If a decree for shares in the specific item is to be granted there is no legal difficulty in granting a decree for the entirety. A man's share in a specific item can no more be predicated than his right to a specific item on a partition. If the purchaser chooses to waive defect and take a conveyance in the terms of his contract he is entitled to get it. He cannot be compelled to accept a part of the contract alone for the entire consideration.

Then as to the form of the decree under S. 15 it should not be expressly restricted to the vendor's share in the item. The cases in 3 Cal. 198 P. C. ; 5 C. 148 P. C. ; 10 Cal. 626 P. C. are all cases of court sales where there is no warrant and this is on the principle that the Court purchaser can have no more right to have the entire item allotted to his vendor on partition than he has the right to substituted properties. 43 M. 309.

Private purchasers have the undoubted right to have the entire item allotted to the vendor.

¹ (1919) 10 L. W. 449.

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The proper decree ought to be his interest in the item and this will satisfy S. 15 "so much as he can perform" and will also satisfy the purchaser who may get the entire item if vendor's interests when ascertained on partition extends to the whole item.

A. Krishnaswami Aiyar in reply:—

S. 17 prohibits a decree for partial performance except in accordance with Ss. 14, 15 and 16. S. 16 deals with divisible contracts and Ss. 14 and 15 deal with single and indivisible contract; contracts by a member of a joint Hindu family must fall within S. 15. The case is really one of part performance. No member can predicate he has an absolute title to an entire item. He cannot assure a legal title to the entirety; therefore until partition any performance if at all will be only partial. Hence S. 15 alone will apply.

The Court expressed the following

Wallis, C. J.

Opinion:—*The Chief Justice:—*I agree with the answer proposed by Kumaraswami Sastri, J. which is in accordance with the view taken in *Nagiah v. Venkatarama Sastrulu*¹ to which I was a party, and also, in my opinion, with the earlier decision of White, C. J. and Krishnaswami Aiyar, J. in *Paraka Subbarami Reddi v. Vadlamudi Seshachalam*². When these learned Judges observed at page, 360. "The plaintiff asks for a decree against the shares of the first and fourth defendants at least. This we think he cannot have," all they meant, as appears from the rest of the judgment, was that he could not have a decree directing these defendants who were parties to the agreement to convey their own interest at a reduced price. This might have been granted in England, but in cases governed by S. 15 of the Specific Relief Act a plaintiff can only have part performance if he is willing to pay the full contract price and to waive all claims for compensation. As the plaintiff in that case expressed his willingness to comply with these conditions, the learned Judges at the close of their judgment gave him a decree as regards the shares of the first and fourth defendants. This amounts to a clear ruling that a case such as the present is governed by S. 15 of the Specific Relief Act. This was the conclusion at which I arrived in *Nagiah v. Venkatarama Sastrulu*¹ and after careful re-consideration I think it was right.

1. (1912) I. L. R. 37 Mad. 887.

2. (1909) I L. R. 83 Mad. 369.

Oldfield, J. :—I agree.

Kumaraswami Sastriar, J. :—The question referred to us for decision is “where the managing member of a Joint Hindu family enters into a contract to sell an item of family property and that contract is not proved to be binding on the other members, can specific performance of it be decreed against him and if so on what terms?”

The answer to the question depends on the provisions of Ss. 15 and 17 of the Specific Relief Act, and the extent and nature of the powers of alienation possessed by a member of a joint and undivided family.

S. 15 of the Specific Relief Act provides that “where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed forms a considerable portion of the whole, or does not admit of compensation in money, he is not entitled to obtain a decree for specific performance. But the Court may, at the suit of the party direct the party in default to perform specifically so much of his part of the contract as he can perform, provided that the plaintiff relinquishes all claim to further performance, and all right to compensation either for the deficiency, or for the loss or damage sustained by him through the default of the defendant.”

It is argued for the appellant that an undivided coparcener professing to sell the whole of an item of joint family property for purposes not binding on the other co-parceners cannot perform the whole of his contract, as he has only a share in the property, that he cannot give a good title even to his share, as his right to it would be contingent on his getting it in a suit for partition, and that in any event all that he can get is a decree for the share belonging to his vendor on payment of the full consideration under the latter part of the section. For the respondent it is argued that, as Courts in working out the equities between the purchaser and the other co-parceners in a suit for partition would allot to the vendor the property conveyed by him, it cannot be said for certain that the vendor is unable to perform his contract and that consequently the purchaser is entitled to a decree directing the vendor to convey the property, leaving it to the purchaser to realise it as best as he can.

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There is a conflict of authority on the point. In *Guruswami v. Ganapathia* ¹ it was found that the agreement by the father to sell was not for necessity and was not binding on his minor son. Sir Charles Turner who delivered the judgment of the Full Bench observed imperfection of title in the seller is not sufficient by itself to justify the Court in refusing to award specific performance of a contract of sale. If the title be such as the seller can legally convey the purchaser has the right to claim the completion of the bargain, although the title he may thereby acquire may not be indefeasible, if a claim be brought by a third party. But the Court may not grant specific performance of the contract if the contract be made by a trustee in excess of his power or involves a breach of trust.

The Full Bench called for a finding as to necessity and held that there was no justifying necessity. A decree was passed directing a sale by the father of his half share on receipt of one half of the purchase money on the ground that while the Judge was unable to enforce the sale in his entirety they considered that to the extent of the father's interest the respondent was entitled to insist on it if he thinks it fit to do so. The contract was entered into before the Specific Relief Act came into force and the decision therefore does not deal with S. 15. It is however authority for the view that a co-parcener can perform part of the contract to the extent of his share. In *Kosuri Rama Raju v. Ivalury Ramalingam* ² the contract to sell was by one of three members of a joint family. It was held by the Subordinate Judge that the contract was not binding on the other members of the family and the suit was dismissed against all the defendants, as he considered it impossible to apportion the consideration for the sale and the property agreed to be conveyed. On Second Appeal Bashyam Aiyangar and Moore, JJ. held that the plaint disclosed no cause of action against the brothers who were not parties to the contract but that the plaintiff was entitled to a decree for specific performance against the person who agreed to sell the property without any determination of the question whether the sale by him would or would not bind the interest of the other defendants in the property. No authorities are cited nor is S. 15 of the Specific Relief Act considered. In *Sreenivasa Reddi v. Sivarama Reddi* ³ the suit

1. I. L. R. 5 Mad. 337.

2. (1902) I. L. R. 26 Mad. 74.

3. (1908) I. L. R. 32 Mad. 320.

was for specific performance of a contract by an undivided father to sell joint property. It was found that the son was not bound by the contract and a decree was passed directing the father to sell his half share on receipt of one half of the consideration. On Second Appeal Sankaran Nair and Pinhey, JJ. were of opinion that S. 15 would only be applicable if the person who agreed to sell had no interest in any portion of the property agreed to be conveyed as in illustration (a) or is unable to convey such portion as in illustration (b) to the section." The learned Judges followed *Kosuri Ramaraju v. Ivalury Ramalingam* ¹ and decreed the specific performance of the contract to sell the whole of the plaint property against the first defendant (who entered into the contract) without determining whether such contract would bind his son. Mr. Justice Sankaran Nair however took the opposite view in *Davvur Subba v. Venkatarami* ² which I refer to presently. In *Subbaraya Reddi v. Vadlamudi Seshachalla Chetty* ³ the contract was by an adult member of a joint family acting for himself and as guardian of the minor co-parceners to sell an item of joint property. It was found that the contract was not binding on the minors and the lower Court dismissed the suit for specific performance against all the defendants including the person who entered into the contract. It was held on second appeal by Sir Arnold White, C. J. and Krishnaswami Aiyar, J. that Ss. 14 to 16 of the Specific Relief Act do not enable such a contract to be separated as regards the person who entered into the contract and the person on whom it was not binding, that S. 17 of the Act precluded the passing of a decree against the share of the person contracting or a decree for the whole against such person but that the purchaser if he was willing to pay the whole of the purchase money was entitled to a decree directing the contracting party to convey his interest in the property. A distinction is sought to be drawn between cases where a finding as to the binding nature of the contract on the other parties to the suit is or is not necessary and no opinion is expressed as to whether the interpretation put on S. 15 in *Srinivasa Reddi v. Sivaratna Reddi* ⁴ by Sankaran Nair and Pinhey JJ., was correct. In *Govinda Naicken v. Apathsahaya Ayyar* ⁵,

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1. (1902) I. L. R. 26, Mad 74

2. (1914) I. L. R. 38 Mad 1187.

3. (1903) I. L. R. 33, Mad. 359.

4. (1908) I. L. R. 32 Mad. 320.

5. (1912) M. W. N. 87.

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the plaintiff sued to enforce the specific performance of an agreement by one of two divided brothers alleging that the defendant agreed to have the sale-deed executed by himself and his divided brother on his own account and as guardian of the minor son. The District Munsif dismissed the suit on the ground that Ss. 15 to 17 precluded him from granting a decree for specific performance of the contract to sell the entire house and the plaintiff did not offer to purchase the defendants' half on paying the full purchase money. The District Judge thought that there was nothing to prevent the plaintiff from getting a decree for the plaintiff being allowed to take a sale-deed for what it was worth but dismissed the suit on the ground of delay. On second appeal it was held by Sundara Ayyar and Spencer, JJ. that the Court cannot direct execution of a deed which on its execution would be useless owing to the vendor having no title over part of the property.

In *Nagiah v. Venkatarama Sastri*¹ the contract was entered into by a father who was the managing member of the family consisting of himself and his adult and minor sons. It was found that the contract was not binding on the sons and the suit was dismissed. It was held by Wallis and Ayling, JJ. that S. 15 of the Specific Relief Act applied to cases where a member of an undivided family agrees to sell part of the joint property in which he has only a share and that circumstance that an undivided father has an interest in every portion of the undivided property conveyed does not take the case out of the operation of the section. After referring to *Kosuri Rama Raju v. Ivalury Ramalingam*² *Sreenivasa Reddi v. Sivarama Reddi*³ *Subbaraya Reddi v. Vadlamudi Seshachella Reddi*⁴ and *Govinda Naicken v. Apathsahaya Aiyar*⁵ the learned Judges observed, "To us, however, it appears that the consideration that an undivided father has an interest in every part of the undivided property in no way takes the case out of the operation of the section which runs thus :—"where a party to a contract is unable to perform the whole of his part of it, and the part which must be left unperformed forms a considerable portion of the whole * * * he is not entitled to obtain a decree for specific performance. We think the words of the section apply where a member of an undivided family agrees to sell part of

1. (1912) I. L. R. 37 Mad. 387.

2. (1902) I L. R. 26 Mad. 74.

3. (1908) I. L. R. 32 Mad. 320

4. (1909) I. L. R. 33 Mad. 359.

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the joint property in which he has only a share ; and the present case is a particularly plain one, because according to the plaintiff's own evidence the 1st defendant agreed to get the other members of the family to execute the sale deed. Further the contract has been decided in the present suit not to be binding on the other members of the family, and to decree specific performance against the 1st defendant only would be merely encouraging useless litigation. We may add that *Barret v. Ring*¹ is no authority on the present point as the facts were entirely different. The plaintiff does not claim the benefit of the latter part of S. 15 of the Specific Relief Act and we dismiss the Second Appeal with costs." In *Subba v. Venkatrami*² the contract was entered into by an undivided father and it was found that it was not binding on the son. It was held by Sankaran Nair and Spencer, JJ. that the plaintiff was not entitled to a decree for specific performance either against the father or the son. Referring to *Nagiah v. Venkatarama Sastri*³. Sankaran Nair, J. observed. "A person is entitled to specific performance of a contract by a member of the Hindu family to sell his share of the family property. But there is no question of part performance in that case. If the learned Judges intended to go further and lay down that if a junior member of a Hindu family agrees to sell any specific property belonging to his family a decree may be passed against him to sell his share of that specific property. I am unable to agree with that view. Because the junior member is unable to perform the whole of his part of the contract by conveying the entire property agreed to be sold and for the same reason that he is not entitled to claim any specific property till partition, conveyance of a portion, is not a part of the contract "as he can perform " in the terms of S. 15 of the Specific Relief Act. On the view that a co-parcener cannot alienate any specific property no specific performance can be decreed."

Where a person sues for specific performance of an agreement to convey and simply impleads the party bound to carry out the agreement there is no necessity to determine the question of the vendor's title, and the fact that the title which the purchaser may acquire might be defeasible by a third party is no ground for refusing specific performance if

1. 65 E. R. 294.

2. (1914) I. L. R. 38 Mad. 1187.

3 (1912) I. L. R. 37 Mad. 387.

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the purchaser is willing to take such title as the vendor has. But where a party seeking specific performance seeks to bind the interests of persons not parties to the contract alleging grounds which under Hindu Law would bind their interests and enable the vendor to give a good title as against them and make them parties, it is difficult to see how the question as to the right of the contracting parties to convey any interest except his own can be avoided and a decree passed the effect of which will merely be to create a multiplicity of suits. As pointed out in *Govinda Naicker v. Apatsahaya Ayyar*,¹ the execution of a sale-deed by a person in respect of property which he has no right to alienate "would be an act improper in itself as it is calculated to throw a cloud over the title of the other parties entitled to share in the property and would give them a cause of action for a suit". With all respect it seems to me that the decisions in *Kosuri Ramaraju v. Ivalury Ramalingam*² and *Sreenivasa Reddi v. Sivarama Reddi*³ which decide that under such circumstances a decree should be passed against the contracting party even if the transaction has been found not to be binding on his co-parceners would afford no protection to any of the parties and as pointed out in *Nagiah v. Vankatarama Sastrulu*⁴ would be merely encouraging useless litigation. I may add that Sankaran Nair, J. who was a party to *Sreenivasa Reddi v. Sivarama Reddi*³ refused to pass such a decree when the same question came up before him for decision in *Subba v. Vankatarama*⁵. I do not think the Court ought to pass a decree directing a sale of the property ordered to be conveyed when it finds that the person agreeing to convey was only a co-parcener with others and the agreement would not bind their interests. Where the person contracting is the father or managing member of the family he stands in a fiduciary relationship to the other members (26 Mad. 553 ; 39 All. 447) and his contract to sell the entire item of joint family property for purposes not binding on them is a breach of duty and I do not think Court ought to compel execution of a sale-deed in such cases of the entire item of property leaving it to the other members to incur the expense and go through the trouble of filing a suit to protect their interests.

1, (1912) M. W. N. 87.

2, (1902) I. L. R. 26 Mad. 74.

3. (1908) I. L. R. 32 Mad 320.

4. (1912) I. L. R. 37 Mad. 387.

5. (1914) I. L. R. 38 Mad, 1187.

(See *Barkunta Barch v. Saheb Doss* ² and *Guruswami v. Ganapathia* ².) There is however no objection to the share of the vendor being ordered to be conveyed in cases where he can dispose of his share as he will then only be exercising his right without detriment to anybody else.

I am also of opinion that S. 15 of the Specific Relief Act applies to such cases. With all deference I am unable to follow the reasoning of Sankaran Nair, J. in *Sreenivasa Reddi v. Sivarama Reddi* ³ to the effect that S. 15 would have application only when the person agreeing to sell has no interest in any portion of the property agreed to be sold. No such restriction appears in the section and the language applies to all cases where a party cannot perform the whole of what he contracts to do whether such inability is due to his not having a good title to the property agreed to be conveyed or has a good title over only a part of the property. The section only reproduces the English Law with the difference that where the party elects to take what he can get he can only do so by giving up claims to compensation; and I can find no such distinction in any of the cases though joint tenants are entitled *per tou et per mic* in the joint property. I agree with the decision in *Nagiah v. Venkatarma Sastrulu* ⁴ that S. 15 is applicable to cases where a father or a member of a joint family agrees to sell an item of joint property under circumstances that would not bind the other members.

There are no texts which deal with the question of a member of an undivided family alienating property for his own private and individual purposes and there can be little doubt that such an alienation is inconsistent with the strict theory of a joint and undivided family governed by the Mitakshara. As pointed out by Mayne "if any member were allowed from time to time to sell his share in the joint family property without severing himself from the family by partition he would be getting the advantages of a partition without submitting to its inconveniences. It would be like the case of partner who claimed the rights to withdraw his capital from the concern at pleasure without withdrawing himself." It is necessary to bear this aspect in mind when considering whether the same princi-

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1. 2 Cal. L. J. 321.

2. I. L. R. 5 Mad. 387.

3. (1908) I. L. R. 32 Mad. 320

4. (1908) I. L. R. 37 Mad. 387.

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ples and equities should be applied where the matter rests on a contract as where the conveyance has been perfected.

The recognition of the rights of a purchaser for value has been, as pointed out by their Lordships of the Privy Council in *Suraj Bansi Koer v. Sheo Persad Singh*,¹ "of gradual growth founded on the equity which the purchaser for value has to be allowed to stand in his vendors' shoes and work out his rights by means of partition." So far as this Presidency is concerned it has been settled by a series of decisions commencing from *Veerasami Goundan v. Ayyasami Goundan*² that a co-parcener can alienate for value not only his share in the entire joint family properties but also his share in a specific item. It was held in *Venkatarama v. Meera Labbai*,³ that a purchaser from a member of an undivided Hindu family cannot sue for a partition of the item sold to him and obtain an allotment by metes and bounds of his vendor's share in that portion of the property. This decision was followed in *Palani Konan v. Masa Konan*.⁴ His remedy is therefore a suit for general partition. When however the other co-parceners have alienated their shares also the purchaser from one of the coparceners can sue and get his share by partition of the item in which only other purchasers are interested. *Iburamsa Rowther v. Tiruvenkatasami Naick*.⁵ So far as the other co-parceners are concerned it is open to them to accept the transfer as valid and seek a partition with the purchaser of the only property in which such purchaser is interested. *Subramaniya Chetti v. Padmanabha Chetty*.⁶

As regards the share to which the alienee would be entitled the view taken by the Full Bench in *Rangasami v. Krishnayyan*⁸ that the share should be computed with reference to the share of the joint-family at the date of the suit for partition filed by him and not the state of things that existed at the date of the alienation; but a subsequent Full Bench of this Court in *Chinna Pillai v. Kalimuthu Chetti*⁹ has taken the contrary view. It may therefore be taken as settled that that there is no fluctuation in the share to which the alienee is entitled and that his

1. (1879) I. L. R. 5 Cal. 166

2. 1 Mad. H. C. R. 478.

3. (1889) I. L. R. 18 Mad. 275.

4. (1896) I. L. R. 20 Mad. 243.

5. (1910) I. L. R. 34 Mad. 269.

6. (1896) I. L. R. 19 Mad. 267.

7. (1910) I. L. R. 34 Mad. 269.

8. (1891) I. L. R. 14 Mad. 408.

9. (1910) I. L. R. 35 Mad. 47.

share will be the share of the vendor at the date of the alienation subject of course to the equities in favour of the other members of the family against the transferor.

The preponderance of authority is in favour of the view that the purchaser of the undivided share of a member of a joint-family does not become a tenant in common with the other members. In *Subba Rao v. Ananthanarayana Aiyar* ¹ Sundara Ayyar and Benson, JJ. were inclined to the view that when a co-parcener alienates his share in joint property, the alienee holds the share as tenant in common with the other co-parceners who as between themselves are joint tenants with respect of their own shares and Krishnaswami Ayyar, J. was inclined to this view in *Chinnu Pillai v. Kalimuthu Chetti* ² A contrary view was taken in *Maharaja of Bobbili v. Venkataramanjulu Naidu* ³ and *Manjaya v. Shanmuga* ⁴ which were referred to with approval by a Full Bench of this Court in *Kota Balabhadra Patro v. Khetra Doss* ⁵ where it was held that an alienee from a member of a joint Hindu family was not entitled to possession of the alienor's share as a tenant in common and that his only remedy was to obtain by partition the share to which the alienor was entitled.

As regards the nature of the equity which is recognised in favour of a purchaser for value of a co-parcener's share it is purely a personal right and is subject to any superior equities which the co-parcener may have against the alienor. In *Dadu Sahib v. Muhammad Sultan Sahib* ⁶ it was held that a purchaser from the purchaser of the share in the joint family properties cannot enforce the equities which his vendor could have enforced and in *Sabapathi Pillai v. Thandavaraya Odayar* ⁶ it was held that a purchaser in Court sale cannot claim a right of substitution but was only entitled to the properties which were comprised in the sale certificate and which fell to the share of the co-parcener whose interests were sold in Court auction. As between the original parties the purchaser has been held to be entitled to the share which the vendor may get in a suit for partition even though the property may not be the property sold but another property which the vendor got for his share.

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1. (1912) 23 M. L. J. 64.

2. (1910) I. L. R. 35 M. 47. (F. B.)

3. (1914) I. L. R. 39 Mad 265.

4. (1913) I. L. R. 38 Mad. 834.

5. (1916) 31 M. L. J. 275.

6. (1919) 39 M. L. J. 706.

7. (1920) I. L. R. 43 Mad. 309.

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I am unable to accept the contention that a co-parcener who agrees to sell an item of joint family property and not merely his share in it is able to perform the contract merely because on the execution of a sale deed, the vendee will be in a position to file a suit for general partition and would, other things being equal, have the chance of getting the property sold allotted to the share of his vendor. The mere execution of a sale-deed is no performance when the vendor has no exclusive title and cannot put the purchaser in possession owing to the superior claims of his co-parceners. When a person agrees to sell property professing to have an absolute power of disposal over it and it is found that it is joint-family property in which he as a co-parcener has only got a share and that the agreement is not binding on the other co-parceners. I do not think he can perform the contract in its entirety. His chance of getting the property may be defeated by the other co-parceners suing for a partition of the particular item alienated and in a suit for partition they may have superior claims or there may not be other properties which can be given to the co-parcener in lieu of their shares in the property alienated. The view that the alienee from a co-parcener becomes a tenant in common with the other co-parceners has not been accepted in the decisions I have referred to and it is now settled the alienees of a share has only an equity to work out his rights by partition. Having regard to the fact that the alienation of a share by a co-parcener without the consent of the others is opposed to the spirit of the joint-family system and that it places the other members in a disadvantageous position, as the alienor still remains a member of the joint-family while conveying his share as also to the fact that it gives the right to an alienee of a small item of family property to disrupt the family by filing a suit for general partition. I do not think Courts ought to put a person whose claim rests on a purely executory contract in the position of a person who by reason of an executed conveyance and the payment of consideration has acquired rights which on equitable grounds Courts consider it desirable to work out in a suit for partition. When the matter rests merely on a contract which under S. 55 of the Transfer of Property Act gives a person no interest in the immovable property the hardship to the other members of the family is an element to be taken into consideration in the exercise of the discretion.

Moreover the Court ought not to hold the vendor capable of performance where all that can be predicated is that if the other coparceners do not file a suit for partition of the item alienated or there exist other properties which can be allotted to him on a general partition so as without defeating any equities between the alienor and the other members to enable the Court to allot the alienated properties to the vendee.

The preponderance of authority is against the view contended for by the respondent. In *Nida Marthi Mukkanti v. Thammana Ramayya* ¹ and *Srinivasa Reddi v. Sivarama Reddi* ² the effect of S. 15 of the Specific Relief Act is not considered and the Court thought that his right to convey need not be gone into. In cases where relief was given in respect of contract prior to the Specific Relief Act the direction was to convey the share of the vendor on an abatement of the price of the purchaser so desired and in subsequent cases his right to convey was left either for determination in another suit or when it was held to be wanting his suit was either dismissed or if he chose the share of the vendor was decreed on payment of the full consideration.

It is conceded that a co-parcener who agrees to sell joint property cannot enforce specific performance against the purchaser where the agreement is not binding on the other coparceners as he has not a title to convey the entire property. The chance of his getting the properties allotted on the partition is not in such cases equivalent to his ability to perform the contract. It is difficult to see how in the converse case it can be held that the person agreeing can perform the contract in its entirety.

I am of opinion that a co-parcener who agrees to convey an item of joint-family property for purposes personal to himself and not binding on the other co-parceners cannot perform his contract in its entirety and that the case falls within the first portion of S. 15 of the Specific Relief Act.

The next question is whether specific performance can be decreed if the plaintiff is willing to take a conveyance of the share of the co-parcener on his paying the full consideration. I am of opinion that there is nothing to prevent the Court from doing this. The decision of the Full Bench in

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1. (1902) I. L. R. 26 Mad, 76.

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Chinnu Pillai v. Kalimuthu Chetty ¹ as finally settled that the share of the alienee from the co-parcener is fixed with reference to what it was at the date of the alienation and is not fluctuating with reference to subsequent events. The co-parcener has a share in each item of the joint family property and there is no difficulty in determining the share of a co-parcener on a given date. Joint tenants are seized a "*per mie et per tout*" and as between themselves have separate rights. On the date of the agreement to convey the person contracting to sell would have a share determined by the number of the co-parceners and the authorities in this Presidency having given the co-parcener a right to alienate his share in a specific item of property, there is no reason why he should not be directed to sell his share especially as that share is not subject to subsequent fluctuation. If the purchaser is willing to pay the full consideration, waive all claim to compensation or damage and take only the share which his vendor is entitled to, nobody can possibly be prejudiced while on the other hand it may be distinctly to advantage of the vendor and co-parcener. Moreover there is nothing to prevent the person, in whose favour the agreement is entered into from filing a suit for damages obtaining a decree and attaching and bringing to sale the share of the person who contracted to sell thereby effecting indirectly what could be done directly if the Court grants him the share.

The English decisions on the subject of specific performance where a party is only entitled to a share are not uniform and the latter part of S. 15 of the Specific Relief Act is a clear departure from the English rule as to abatement or compensation when specific performance of part of a contract is decreed.

In *Lumley v. Ravenscroft* ² Lord Lindley stated the general rule to be that in the absence of misrepresentation or misconduct when a person is jointly interested in an estate with another person and purports to deal with the entirety specific performance will not be granted against him as to his share and that his remedy was only remedy by way of damages. But in *Hexter v. Pearce* ³ specific performance was granted of a contract relating to an undivided moiety of

1. (1910) I. L. R. 35. M. 47.

2. 1895, I. Q. B. 683.

3. (1900) 1 Ch. 341.

mineral property. In *Burrow v. Cammell* ¹ a defendant who was entitled only to a moiety of the premises agreed to be sold was directed to perform specifically so much as she was able to perform with a proportionate abatement in this consideration. In *Hooper v. Smarl* ² it was held that where the vendors, were entitled only to a moiety of the property agreed to be sold specific performance was decreed of the moiety with the abatement of the one half of the purchase money.

So far as the decisions in India go specific performance has been decreed of the share to which the vendor was entitled if the purchaser would take it. In *Gurusami v. Ganapathia* ³ a decree was passed directing conveyance of the half share to which the party contracting was entitled; The fact that section 15 would be a bar to the abatement in the price ordered does not affect the granting of the relief as to the share if the purchaser is willing to take it without claiming any abatement in the price. In *Srinivasa Reddi v. Sivarama Reddi* ⁴ it was held that the plaintiff was entitled to a decree for a specific performance directing the conveyance of the vendor's share if he paid consideration. In *Shama v. Kumad* ⁵ where a member of a family governed by the Mithatshara purported to sell the whole property and the agreement was found not to be binding on the other members specific performance of the contract in respect of the one fourth share of the defendant was ordered without any abatement in the price. In *Deen Dayal v. Jugdeep Narayan* ⁶ their Lordships of the Privy Council while directing possession of property sold in execution of a decree to be given back to the coparceners added a declaration that the appellant as purchaser in execution sale acquired the share and interest of the judgment debtor in that property and was entitled to take proceedings to have that share ascertained. They only refrained from specifying the share as it may be that the wife of the judgment-debtor and mother of plaintiff may be entitled to a share. In 5 Cal. 175 the decree setting aside the execution sale in its entirety was set aside and a declaration granted "that by virtue of the execution sale to them the respondents acquire only the third undivided share * * * which belonged to Adit Sahai with such power of ascertaining the extent of such

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1. 19 Ch. D. 181..

2. L. R. 18 Eq. 683.

3. I. L. R. 5 Mad. 337.

4. (1909) I. L. R. 33 Mad 352.

5. 27 Cal. L. J. 611.

6. I. L. R. 5 Cal. 209.

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third part a share by means of partition as Adit Sahai possessed in his lifetime."

I am of opinion that in all cases where the plaintiff elects to take the share on payment of the full consideration agreed upon the share of the vendor on the date of the contract should be specified.

My answer to the question is that S. 15 Specific Relief Act applies to cases covered by the order of reference and that specific performance cannot be granted of the contract so as to direct execution of a conveyance of the entire property but that it is open to the purchaser to get specific performance so far as the share of the vendor is concerned on payment of the consideration agreed upon without any abatement.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR JOHN WALLIS, CHIEF JUSTICE AND
MR. JUSTICE KRISHNAN.

Vemureddi Babureddi ... *Petitioner* (1st accused in Preliminary Register case No. 2 of 1921 on the file of the Court of the 2nd class Magistrate of Kovur).*

In. C. M. P. No. 979 of 1921.

F. T. Ward, Pleader for Vemureddi Babureddi

... *Petitioner.*

Practice—Counsel cited as witness—Right to appear as counsel.

Vemureddi
Babureddi,

A pleader does not become incompetent to appear for one of the parties in a cause merely by reason of his being cited as a witness therein. The rule as to the exclusion of witnesses from court until they have been examined has no application to solicitors and counsel appearing to conduct the case on behalf of a party.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, and S. 107 of the Government of India Act praying the High Court to revise the order of the Court of the 2nd class Magistrate of Kovur dated 14th March 1921 in Preliminary Register case No. 2 of 1921.

Petition under S. 107 of the Government of India Act under the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order setting aside the ruling of the court of the Second Class Magistrate of Kovur, dated,

* Cr. R. C. No. 224 of 1921 (Cr. R. P. No 176 of 1921) and C. M. P. No. 979 of 1921.
1st April, 1921.

the 14th day of March 1921. Preliminary Register Case No. 2 of 1921 and allowing the petitioner herein to appear and defend on behalf of the 1st accused in the said case.

Vamureddi
Babureddi.

S. Swaminadhan, T. R. Ramachandra Iyer, A. Krishna-swami Iyer and K. Balasubramania Iyer for the Petitioner.

J. C. Adam (Public Prosecutor) for the Crown.

The Court delivered the following

Order:—These are applications put in by Mr. F. T. Ward, a first Grade Pleader of Nellore and by his client the 1st accused in a murder case, under S. 107 of the Government of India Act and S. 435 Criminal Procedure Code, to set aside an order of the 2nd class Magistrate of Kovur debarring Mr. Ward from appearing as Counsel for the 1st accused at the preliminary inquiry on the ground that his name appears in a supplemental list of witnesses put in by the prosecution as 42nd witness for the prosecution. Such an order is wholly unprecedented and is not supported by any of the cases referred to in the order. The Magistrate states that as a prosecution witness Mr. Ward cannot sit in Court on the accused's behalf until he is called in for examination in due order by the prosecution. The rule as to the exclusion of witnesses from Court until they have been examined is not without exceptions. It does not extend to the parties themselves in civil cases so long as they conduct themselves properly, or to their solicitors whose assistance is necessary for the proper conduct of the case. Roscoe's Nisi Prius Vol. 1 page 159, 18th Edn. The same rule applies in Criminal Cases: Roscoe's Criminal Evidence page 114, 13th Edn; and it has never been suggested that the fact that in England the accused is now a competent witness justifies his exclusion from the court during the trial. There are even stronger reasons for not applying the rule to the Counsel of the parties who have to conduct the case and this is apparently the first case of its application to them which has come before a superior Court.

• In our opinion the rule does not apply to Counsel either in England or in India and further it would not be easy to reconcile its application to them with the provisions of S. 340 Criminal Procedure Code. The Bar Council has no doubt laid down for the guidance of the profession certain rules as to refusing retainers or withdrawing from the case where they are summoned as witnesses. See *Weston and others v. Peary Mohan*

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Dass.¹ But there is nothing in those rules to suggest that circumstances which may make it desirable for a counsel not to appear render his appearance illegal. On the contrary the rules in question are for the guidance of Counsel in the exercise of their legal right to appear or refuse to appear. It might be otherwise if by appearing in a case a counsel became incompetent to be a witness. It is however now well-settled that there is no such incompetency, as held by Woodroffe J. in the case cited on the authority of *Cobbett v. Hudson*¹ and *Corea v. Peiris*² where a counsel in the case gave evidence and no objection was taken to the propriety of his so doing in the particular circumstances of that case.

Further it cannot be said at the present stage of the case and on the materials before us that there are circumstances which make it desirable that Mr. Ward should retire from the case. It is not suggested that he knows anything about the alleged murder itself. All that is suggested is that he acted for the 1st accused in certain civil matters which may have afforded a motive for the crime; and even as to these matters as pointed out by the Public Prosecutor, it may be open to him to plead privilege. The order of the Magistrate must be set aside.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE RAMESAM.

Arumugam Pillai (minor) by ... *Appellant* (1st Respondent*
mother and guardian *Judgment debtor.)*
Gomathi Ammal.

v.

N. P. R. M. V. R. M. ... *Respondent (Petitioner decree*
Alagappa Chettiar *holder.)*

Civil Procedure Code, O. 34, R. 14—Simple money decree—Execution sought against property mortgaged—Mortgage unenforceable.

Unless there is a subsisting mortgage on which a suit for sale can be brought there is no scope for the operation of O. 34, R. 14 of the Civil Procedure Code. Where therefore a mortgage is ineffective for non-compliance with statutory requirements or where it no longer subsists as a mortgage, O. 34, R. 14 of the C. P. Code will not bar a sale of the properties in execution of a money decree.

* A. A. O No. 287 of 1920.

10th February, 1921.

1. [1913] I. L. R. 40 Cal. 898.

2. (1852) I. E. & B 11.

3. (1909) A C. 549.

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Appeal against the order dated the 20th September, 1920 of the Court of the Subordinate Judge of Tuticorin in E. P. No. 27 of 1920 in O. S. No. 85 of 1916.

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Chettiar.

K. Jagannadha Aiyar and *S. Subramania Aiyar* for appellant.

T. R. Venkatrama Sastri and *K. S. Sankara Aiyar* for respondent.

The Court delivered the following

Spencer, J.

Judgments :—*Spencer, J.* :—I agree with the learned Subordinate Judge that the provisions of O. 34, R. 14 of the Civil Procedure Code do not apply to the facts of this case as the money decree obtained by the respondent was not strictly in satisfaction of a claim arising under the mortgage. It appears that the bond was not valid as a mortgage on account of the minor's guardian having failed to obtain the leave of the Court under S. 29 of the Guardian and Wards Act to charge the minor's immoveable property.

The decree declared that the debt might be recovered from the property that was made subject to the mortgage and from the 1st defendants' other properties.

Assuming that these words were intended to create a charge the case of *Sowbagia Ammal v. Manicka Mudaliar* ¹ cited in the Lower Court's order is an authority for holding that O. 34, R. 14 of the Civil Procedure Code will not operate as a bar to the sale of such property. *Hem Ban v. Bihari Gir* ² is a similar case of a charge created by a decree though the decree was a compromise decree. *Gobinda Chandra Pal v. Karlas Chandra Pal* ³ was a case of a charge created by the act of the parties in the shape of a security bond, the property being also subject to another mortgage. It is therefore distinguishable. It does not transpire from the report of that case why a money decree only was passed on the security bond. *Madho Prasad Singh v. Baij Nath* ⁴ a case of an oral disclaimer of mortgage right has been distinguished in *Chadi Lal v. Seadat-un-nissa Bibi* ⁵. *Suraj Narain Singh v. Jagbali Shukul* ⁶ is to the same effect. I am unable to understand how *Narsingh Das v. Munna* ⁷ can be sustained as good law on the facts

1. (1917) 33 M. L. J. 601.

2. (1906) I. L. R. 28 All. 58.

3. (1917) I. L. R. 45 Cal. 530.

4. (1906) 2 All. L. J. 356.

5. (1916) I. L. R. 89 All. 36.

6. (1920) I. L. R. 42 A. 566.

7. (1909) 6 All. L. J. 731.

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that appear from the judgment which do not seem to be on all fours with those in *Madho Prasad Singh v. Baij Nath* ¹.

I am of opinion that where the mortgage right is extinguished by limitation or by compromise or is in some way ineffective through some legal defect, O. 34, R. 14 of the Civil Procedure Code will not bar a sale in execution of a simple money decree.

The appeal against order fails and is dismissed with costs.

Ramesam, J.

Ramesam, J. :—I agree. The only point argued by the appellant is that the property cannot be sold in the present execution proceedings without bringing a fresh suit for sale and reliance is placed on O. 34, R. 14 of the Civil Procedure Code.

In the first place we construe the decree as giving no charge and this is conceded by the respondent. That being so, there is no need to apply the decision in *Soubagia Ammal v. Manicka Mudaliar* ² and the case in *Gobinda Chandra Pal v. Kailas Chandra Pal* ³ is not applicable as the facts of that case show that, in the suit on the security bond, there was a decree declaring a lien though why such a decree was passed is not clear from the report.

The appellant's contention is next based on the cases in *Narsing Das v. Munna* ⁴ and in *Madho Prasad Singh v. Baij Nath* ¹. The former case was cited in argument in the case of *Chadi Lal v. Seadat Un-nissa Bibi* ⁵ and not expressly referred to in the judgment. In my opinion the cases of *Chadi Lal v. Seadat Un-nissa Bibi* ⁵ and *Suraj Narain Singh v. Jagbali Shukul* ⁶ which follows it, lay down the correct principle viz., that, unless there is a subsisting mortgage on which a suit for sale can be brought, there is no scope for the operation of O. 34, R. 14 of the Civil Procedure Code. The case in *Madho Prasad Singh v. Baij Nath* ¹ was no doubt followed in *Kishen Lal v. Umrao Singh* ⁷, but in view of the actual decision in the latter case, viz., that the sale when in fact held, in contravention of S. 99 of the Transfer of Property Act (O. 34, R. 14) is not void the approval of the former case is not

1. (1905) 2 All. L. J. 356.

3. (1917) I. L. R. 45 Cal. 580

5. (1916) I. L. R. 39 All. 35

2. (1917) 33 M. L. J. 601.

4. (1909) 6 All. L. J. 731.

6. (1920) I. L. R. 42 All. 566.

7. (1908) I. L. R. 30 All. 146.

of much force. The former case *i. e.* *Madho Prasad Singh v. Baij Nath* ¹ has been also distinguished in *Chadi Lal v. Seadat Un-nissa Bibi* ². I doubt whether, after the disclaimer of the mortgage by the mortgagee in the former case it was really open to him to file a suit for sale on it. I rather think he would have been precluded from doing so. Anyhow it was only because it was conceded before the learned Judges (Banerjee and Richards, JJ.) that the mortgage was still subsisting that the case was decided in the way it was (See *Chadi Lal v. Seadat Un-nissa Bibi* ². As to *Hein Ban v. Bihari Gir* ³ I observe that it was distinguished in *Ganesh Singh v. Debi Singh* ⁴ and though I am not able to follow the ground of the distinction for I see that the decree in the former case was a compromise decree; still it may be that it can be distinguished on another ground. There seems to have been a charge given in the decree and possibly the decree was merely declaratory in its nature. If so, the case might have been correctly decided. If it were not so, I am inclined to dissent from it, having regard to the principle now laid down by the same Court in the latter cases with which I agree. The result is the appeal fails and is dismissed with costs. In view of the statement by the decree-holder in column 10 of his petition, "There is also the mortgage right", I think it must be made clear in the proclamation, before the remaining properties are brought to sale that there is no such right subsisting in the decree-holder.

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Appeal Dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SPENCER AND MR. JUSTICE RAMESAM.

Narayanasamy Naicker

and another

... Appellants * (Plaintiffs.)

v.

Periasamy Odayar

... Respondent (Defendant.)

* Limitation Act, Art. 134, 141, 144 and 148—Mortgage with possession by last male owner—Transfer by mortgagee as absolute owner—Suit for redemption by reversioner—Limitation.

R, a Hindu owning certain properties mortgaged them with possession in 1866 and died thereafter, leaving only daughters. The mortgagee sold the properties

* S. A. No. 289 of 1920.

2nd February, 1921.

1. (1905) 2 All. L. J. 356.

2. (1916) I L. R. 39 All. 36.

3. (1905) I L. R. 28 All. 68.

4. (1910) I. L. R. 32 All. 377.

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absolutely to the defendant in 1900 and gave him possession. The last surviving daughter of R. died in 1906 and in 1914 the daughters' sons of R. brought a suit for redemption and possession of the mortgaged properties.

Held, that the suit was governed by Art. 134 and not by Arts. 141, 144 or 148 of the Limitation Act and that it was barred by limitation.

Scope of Art. 141 of the Limitation Act discussed by Ramesam, J

Second Appeal against the decree of the Court of the Subordinate Judge of Kumbakonam in Appeal Suit No. 195 of 1918, preferred against the decree of the Court of the District Munsif of Valangiman in Original Suit No. 35 of 1917.

K. P. M. Menon and *G. K. Narayan* for 2nd appellant.

T. R. Venkatrama Sastri and *T. S. Anantarama Aiyar* for respondent.

The Court delivered the following

Spencer, J.

Judgments :—*Spencer, J.* :—In the course of full and able arguments on either side to which we have listened, no reported case has been cited in which a question arose of a choice between the application of Art. 134 or 141 of the Limitation Act. *Kannusami Thanjirayan v. Muthusami Pillai* ¹ was an instance of a conflict between Art. 134 and Art. 144. I then observed that it was clear that the plaintiff could not have resort to Art. 144 unless he first showed that Art. 134 was inapplicable, the reason being that Art. 144 is the residuary article for suits for the possession of immoveable property, as is indicated by the words "not hereby otherwise specially provided for."

There is no indication that Art. 134 should not be applied to suits for possession of immoveable property, which but for that article might have been governed by the period of limitation prescribed in Art. 141. In *Seeti Kutli v. Kunhi Pathumma* ² the Learned Chief Justice after discussing the law of limitation applicable to similar actions under the English Act pointed out that Art. 134 of the Indian Limitation Act was in its origin wholly self-contained and was not appended as a proviso to any of the sections. A reversioner's disability to sue for possession while a Hindu female is the owner in possession of the estate has not been treated by the legislature on the same footing as the disability of a minor, an idiot, or an insane person, in whose favour by S. 6 of the Act an extra period has been allowed for instituting their suits whatever

1. (1916) 5 Law Weekly 250.

2. (1917) I. L. R. 40 Mad. 1040.

may be the article applicable to a suit of the same description by a person not so disabled.

The transfer by the mortgagee Vasudeva Naick of the absolute title to the defendant was in 1900. A perusal of Exhibit III leaves no doubt in my mind that it was an absolute sale for good consideration. Kaveri Ammal the last female owner died in 1906. She had 6 years before her death to sue under Art. 134 to recover the property, and the plaintiff had 6 years after her death till 1912, but he neglected to move in the matter till 1914.

Kaveri Ammal's quiescence during those first six years will not amount to an act of alienation which the reversioner on succeeding to the estate can sue to set aside. Both were equally negligent in preserving the interests of the mortgagor which they in turn represented.

The Subordinate Judge was therefore right in holding that the present suit in respect of the 1/5th share of lands and house mortgaged by the last male owner in 1866, and afterwards transferred by the mortgagee in 1900 was time-barred under Art. 134. The plaintiff's claim for a 3/5th share of lands and house alleged to have been sold in 1865 is barred by adverse possession that commenced during the life-time of the last male owner, and he failed to prove that there was any other 1/5th share of the house still remaining unalienated. The result is that the Second Appeal fails and is dismissed with costs.

Ramesam, J.—The subject matter of the suit is a house and 4/5th share of certain lands. It is common ground that one Rangaswamy Naicker was the original owner of 4/5th share of the house and 4/5th share of the lands. Whether he was also owner of the remaining 1/5th share of the house will be dealt with latter on. Rangaswamy died in 1867 leaving three daughters and the youngest of these who survived the others died in 1906. The plaintiffs who are daughter's sons of Rangaswamy being the sole reversioners, brought this suit in 1914, that is, within 12 years after the death of the last daughter, to recover possession of the properties. The defence is (1) as to 1/5th share in the house and a like share in the lands, they were mortgaged by Rangaswamy in 1866, with possession to one Vasudeva who sold the property in 1900 to the defendant and hence the suit is barred by limitation under Art. 134 of the limitation Act ;

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(2) As to 3/5th share in the house and a like share in the lands they were sold with Rangaswamy's consent in 1865, by Appavu, a mortgagee of Rangaswamy for discharging the mortgage debt, to Vasudeva, who sold them to the defendant in 1900.

It is suggested for the appellant that there is a 1/5th share of the house, belonging to Rangaswamy and left untouched by these transactions, and the plaintiff is entitled to a decree for this share as his suit is obviously not barred having regard to Art. 141 of the Limitation Act. It does not appear that the plaintiff made this claim in the courts below. Having regard to the fact that the ownership in the village depended on the Pangu right or share in a mirasi village and share in the house generally corresponded with the share in the lands and to the fact that Rangaswamy purchased 1/5th share in the house and a like share in the lands from his brother Ramaswamy and had 3/5th share in both, in his own right, it does not appear that Rangaswamy had ever possessed the remaining 1/5th share in the house by purchase or otherwise. There is no evidence on record to support the right of Rangaswamy to more than a 4/5th share of the house. On this ground, the last contention of the appellant must be negatived.

As to the lands said to be sold in 1865, it appears that the sale deed of 1865 was unregistered and the appellant also contends that the secondary evidence of the sale deed has been wrongly admitted. But there is other evidence in the case including plaintiff's admissions from which it can be reasonably inferred that Vasudeva got into possession in 1865 under an attempted sale whether the sale was valid or not, and adverse possession began during the life time of Rangaswamy—as found by the Subordinate Judge. If so, the appellant's case fails as to the 3/5 share also.

The only portion that remains to be considered is the 1/5th share mortgaged in 1866 and this turns on a pure question of law viz., whether Art. 141 or Art. 134 applies to the case. At the outset, I may point out that the transfer of 1900 was accompanied by possession, thus avoiding the difficult question discussed in *Seeti Kutti v. Kunhi Pathumma*¹. As it is clear that the language of Art. 134 applies literally, the argument for the appellant may be stated at its best in the form that where Art.

1. (1917) I. L. R. 40 Mad. 1040; 88 M. L. J. 820 (F. B.)

141 is applicable as well as another article, the former prevails and as an illustration, the case in *Runcho Das v. Parvati Bai*,¹ was relied on where it was held that Art. 144 did not apply and Art. 141 applied. The obvious reply to the argument so far as it relates to Art. 144 is that, that case was not a case to which both articles apply, as Art. 144 by its language can never be applied if there is another article which is applicable. But, the main argument has still to be considered as to other articles. The articles dealing with suits for recovery of immoveable property including, for this purpose, the suit described in Art. 148 also—are Arts. 134 to 144 and Art. 148. Omitting Art. 144 from consideration on the ground that it cannot apply where any other article applies, those that remain are Arts. 134 to 143 and 148. As to them, it is contended for the appellant that wherever a suit falls under Art. 141 and also under any one of the other articles, the former ought to prevail as, since the enactment of Limitation Act of 1871, the intention of the Legislature was to do away with the rule that prevailed under the Limitation Act of 1859, viz., that adverse possession against the widow is also adverse possession against the reversioner (See *Nobin Chandra v. Guru Pershad*², and to give the reversioner the benefit of a longer period of limitation. Now the suits of Hindu reversioners which may fall under any of the Arts. 134 to 140, 142, 143 and 148 (and to which Art. 141 may seem also to apply) may be divided into three classes :

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(1) Suits where the cause of action has accrued during the life-time of the last male owner or his predecessor in title and the period of limitation under the specific article has expired during the life time of one of the intermediate female owners. Will Art. 141 help the reversioner in such a case and extend the period under the Specific article to twelve years beyond the death of the female and enable him to recover the property ? The appellant's Counsel concedes that Art. 141 does not apply to such cases and the reason he gives is that the reversioner is not 'entitled' within the meaning of Art. 141, to recover possession, for, the right would be already barred in these cases.

(2) Suits where the cause of action has accrued during the life-time of the last owner or his predecessor in title, but

1. (1899) I L R. 23 Bom 725 2. (1358) B L R F. B. Ruling 1003.

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the period of limitation under the specific article has not expired during the life-time of intermediate female owners. In such a case, the period of limitation has only partly run, leaving a balance of the period within which the suit may be brought by the reversioner successfully. In such a case, will the reversioner's suit be governed by Art. 141 so as to give him a period of 12 years from the death of the female—which will be longer than the balance left under the other article, except in the case of a suit under Art. 148 when the result of applying Art. 141 may be even to cut down the period given by Art. 148? The appellant's Counsel concedes that Art. 141 does not govern such a case. But his former reason that the reversioner is not entitled on the death of the female is not available to him here for, in this case, the reversioner is entitled to possession on the death of the female, whatever article is applied. Why should Art. 141 be construed so as to exclude this class of cases if the appellant's contention that Art. 141 should be applied to all cases to which it apparently applies is correct.

(3) Where the cause of action accrued, not, during the life time of the last male owner or his predecessor in title, but, after his death and during or at the end of the life of the intervening female cases falling under this class cannot be governed by Arts. 136 and 137 but the other Arts. (134, 135, 138 to 140, 142 and 143 and 148) may be applicable to them. As to these the appellant's Counsel contends that notwithstanding the applicability of any one of these specific articles, Art. 141 applies also to the suit and prevails over the other articles if it is for the benefit of the reversioner. This last qualification has to be added, for, in a suit of the kind described in Art. 148, the application of Art. 141 may have the effect of cutting down the period of 60 years. This argument of the appellant's Counsel depends on the construction of the words 'entitled to possession' as meaning 'entitled to recover possession on any cause of action' thus giving a wide scope to the suits described under Art. 141, and, further, apart from the anomaly of giving no explanation why it should not govern the second class of cases mentioned by me involves the following two propositions :

(1) The articles of the Limitation Act may be overlapping. Two articles may be both applicable to the same class of suits,

(2) That, the Court can pick and choose from the articles that which ought to be applied to the case, sometimes one and sometimes the other, whichever gives the longer period of limitation with reference to the facts of each case. There is no warrant for these propositions and I do not understand the cases in *Ishur Chandar Bahadur v. Jibun Kumari Bibi* ¹ and *Nathen Chetti v. Sundra Raja Ayyangar* ² as supporting the first proposition. There is always one article applicable to a case and the Court has to find it though more than one may seem to be applicable and such a construction of the various articles has to be adopted as to confine each article to one exclusive category of suits. One principle in the working out of this process is the maxim *Generalia Specialibus non-derogant, specialia derogant generalibus*.

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The second proposition is still more untenable and the fact, that the appellant's argument involves it, is a very strong argument against it. It is true that this strong argument is furnished only by bringing in suits described in Art. 148 for consideration among the suits for recovery of immoveable property. If it is said that such suits are only suits to redeem and there is no analogy between Art. 148 and the other articles (134 135, 138 to 140, 142 and 143) the reply is that the suit under Art. 134 is certainly analogous to the suit under Art. 148. Both are based on a mortgage; even in Art. 148, the suit may be described as a suit to recover the property if it is the plaintiff's case that a mortgage is discharged; and even in a suit under Art. 134 the appropriate relief against a transferee is a decree for redemption as the transferee gets by the transfer at least the rights of his transferor. In this light I would construe Art. 141 to cover only those cases in which the cause of action is simply the death of the female and the only obstacle to the reversioner seeking to obtain possession is either an act of the female or her inaction—in either case resulting in the loss of possession to a stranger and the need of a suit on behalf of the reversioner. It does not cover cases where the cause of action includes something more beyond this e.g. a transaction by the last male owner such as a mortgage (Art. 148) a mortgage by him and transfer by the mortgagee (Art. 134) a purchase in Court auction (Art. 138), a lease (Art. 139) or a carving by him

1. (1888) I. L. R. 16 Cal. 25.

2. (1897) I. L. R. 21 Mad. 141 : 7. M. L. J. 275

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of life-estates with a remainder or a reversion following it (Art. 140) or any transaction involving the possibility of forfeiture (Art. 143) or loss of possession by him (Art. 142). In these cases, the specific article applies. This is the respondents' contention and the result of accepting it would be that Article 141 does not apply to the first two classes of cases and, in the 3rd class of cases.

(a) of the Arts. 134, 135, 138, 144 and 148 no two are overlapping.

(b) Art. 144 has to be applied last.

(c) Each of the other articles has to be applied when the suit is of the kind described in it, even if it is a suit by a reversioner.

(d) Only when the suit is of a kind not described in the articles 134, 135, 138-140, 142, 143 and 148, does Art. 141 apply to suits by reversioners the discontinuance of possession in Art. 142 referring to a discontinuance during the last male owner's life-time.

If the intention of the legislature when it departed from the Act of 1859 and introduced Art. 141 in the later Acts was to give the reversioners the benefit of a longer period in all suits to recover possession—even where the suits are of the kind described in the other articles, such intention would have been attained and expressed better, not, by the introduction of a separate Article like Art. 141, but a general section somewhat as follows: "where in the suits described in Articles 134 to 144 and 148 the plaintiff is a person entitled to the right on the death of a Hindu female and the cause of action accrues during or at the end of the life of the female the interval between the accrual of the cause of action and the death of the female, shall be excluded from the computation of the period in the second column.

I am therefore of opinion that the suit is governed by Article 134.

Another argument of the learned counsel for the appellant is that such a construction will leave the reversioner remediless, for the intervening female may allow the suit to be barred and he himself has no right to bring a suit. Apart from the consideration, that the fact that some possible hardship, cannot stand in the way of accepting a construction of a statute otherwise clear, I am unable to agree with the proposition that the reversioner cannot intervene for the protection of

the actual reversioner, if the widow neglects to take action. In support of his proposition, the learned counsel for the appellant relied on the dictum of Srinivasa Aiyangar, J in *Seetikkuṭṭi v. Kunlu Pathumma* ¹. "Further, the article cannot, I think, apply to suits where, at the time of the transfer the mortgagor was not entitled to sue for possession etc." This dictum was not necessary for the decision of the point before the Full Bench and I respectfully dissent from it. When we see the varying attitude of the legislature in respect of the suit described in Art. 134 (See 14 M. L. A. I at page 50, Act of 1859, 9 All. 97 on the Act of 1871, 12 Mad. 316), it is clear that the object of the Article was to cut down the period available to the mortgagor under Art. 148 and to compel him to watch the conduct of the mortgagee and to intervene on a transfer thus making the transfer a cause of action which otherwise did not exist.

The decisions in *Ramchandrar v. Kallu*, ² and *Vengamma v. Chelamayya* ³ hold that the reversioner cannot sue to redeem during the life-time of the widow. Ordinarily this is true, but I do not understand the cases to lay down that in a case when the appropriate allegations are made and the facts are proved to the effect that the intervening female's conduct is such as to raise the apprehension that the property will never be redeemed or altogether lost to a transferee, the reversioner cannot maintain an action for the preservation of the property, on the same principle that actions to restrain waste are allowed (See Mayne's Hindu Law, Paragraph 647 and cases cited thereon, especially the Full Bench B. L. R. page 1008 at page 1013-1014 per Sir Barnes Peacock.

I am therefore of opinion that Art. 134 applies to the 1/5th share of the house of the land mortgaged in 1866.

The result is the whole second appeal fails and is dismissed with costs.

Second Appeal dismissed.

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1. (1917) I. L. R. 40 Mad. 1040; 1054 at page 1061.

2. (1908) I. L. R. 30 All. 497.

3. (1912) I. L. R. 36 Mad. 484.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE NAPIER.

Krishna Kone ... *Petitioner** (*Accused.*)

v.

Narayana Dass ... *Respondent* (*Complainant.*)

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*Criminal Procedure Code, Ss. 350 (3) and 422—Award of compensation—
Appeal—Notice to accused, if essential.*

An accused person has no right to be heard on an appeal by the complainant against an order awarding compensation and notice of the appeal need not be given to the accused. The only person entitled to notice of such an appeal is the District Magistrate. *Guruswami Naicken v. Tirumurthi Chetty* (1) Relied on.

Petition under Ss. 435 and 439 of the Code of the Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the District Magistrate of Tinnevely in Criminal Appeal No. 29 of 1920 preferred against the order of the Court of the Stationary Sub-Magistrate of Tinnevely in C. C. No. 788 of 1920.

Chidambaram and Marthandam for Petitioner.

V. L. Ethiraj for the Crown.

S. T. Srinwasa Gopalachariar for the complainant respondent.

The Court delivered the following

Order :—This is a petition to revise the order passed by the District Magistrate of Tinnevely setting aside an order passed by the Stationary Sub-Magistrate of Tinnevely granting compensation under S. 250, Criminal Procedure Code. Two points are taken, one is that no notice was given to the accused in whose favour the order was passed ; and secondly that no notice was given to the Public Prosecutor.

With regard to the first objection that no notice was given to the accused, the matter seems to me to be concluded by the decisions of this Court namely, *Ambakkagari Nagi Reddi v. Basappa* ² and *Guruswami Naicken v. Tirumurthi Chetty* ¹. I can find nothing in the language of the learned Judges in *Venkatrama v. Krishna* ³ to throw any doubt on the correctness of those decisions.

The question whether notice has to be given to the Public Prosecutor is a different matter. The power of appeal is found

*Cr. R. C. 618 of 1920. (Cr. R. P. 515 of 20) 2nd December 1920.

1. (1914) 27 M. L. J. 629.

2. (1909) I. L. R. 33 Mad. 89.

3. (1915) I. L. R. 58 Mad. 1091 ; 28 M. L. J. 204.

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in S. 250 (3) ; "A complainant or informant who has been ordered under sub-S. (1) by a Magistrate of the 2nd and 3rd class to pay compensation to the accused person may appeal from the order as if such complainant or informant had been convicted on a trial held by such Magistrate." The important words in this sub-section are the last words. These were considered by a Bench in *Venkatrama v. Krishna* ¹ and Seshagiri Iyer, J. uses a very guarded expression, "S. 250 is not self contained as are sections relating to the grant of sanction and to convictions for contempt. I am not prepared to hold that Chap. 31 does not apply to compensation appeals." It seems to me that with all deference to the learned Judge, Chap. 31 applies to the extent that certain provisions in Chap. 31 have been incorporated in S. 250 (3) by reference. This seems to be the view taken by the Bench in *Gurusami Naicken v. Thirumurthi Chetti* ² for the learned Judges considered the terms of S. 422 and refer to the language "such officer as the local Government may appoint in this behalf." What are to be found in that section, I have no doubt that the proper way to treat this Chap. 31 is to incorporate all that is suitable and proper for appeals in S. 250 (3). In my opinion, it is not possible to limit the words "may appeal from the order as if such complainant had been convicted", to because if it is only the form in which the appeal is to be laid, the form in which the appeal should be laid ; that is to be incorporated there is not to be found any provision for the hearing of the appeal. To my mind every section in Chap. 31 which can assist the procedure of hearing and disposing of appeals according to the principle of the Code should be incorporated. It has to be noted that in S. 250 (3) the name of the Court to which the appeal shall lie is not even stated, and we have to go to S. 407 to find which is the proper Court. It is therefore necessary to incorporate S. 407 which provides that a person who was convicted on a trial held by any Magistrate of the 2nd or 3rd class which words in S. 407 apply exactly to the words in S. 250 (3) as if he had been convicted on a trial held by such Magistrate, may appeal to the District Magistrate.

Then as to the form of the appeal I have no doubt that

1. (1915) I. L. R. 38 M. 1091.

2. (1914) 27 M. L. J. 629.

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S. 419 must be incorporated and then S. 421 which authorises the Appellate Court to dismiss the appeal summarily. Then we come to S. 422. If the appellate court does not dismiss the appeal summarily, it shall cause notice to be given to the appellant or his pleader and to such officer as the Local Government may appoint in this behalf. "It has been suggested by counsel for the respondent that this clause should not be incorporated. The answer to that is that on the language of S. 423 which he admits must be incorporated, for there is no other provision for the appeal. S. 422 necessarily should be incorporated because the words are "the appellate court shall then" that is, after the procedure in S. 422 has been complied with "send for the records of the case" and it also contains in specific words the provision for the hearing of the Public Prosecutor.

It is suggested that the words "as if" used in S. 250 do not necessarily imply that the whole procedure is incorporated. It seems to me that if any limitation is to be made it is only such limitation as is required by the doctrine of *mutatis mutandis* and that is, as long as there is a provision which is suitable for the class of cases to which the incorporated provisions are made applicable, the requirement of the procedure laid down therein should be appropriated to that class of cases with as little variation as possible. I am therefore clear that the words in S. 422 "and to such officer as the Local Government may appoint in this behalf" are incorporated in S. 250 Cl. (3)

The Public Prosecutor has invited my attention to R. 60 of the Criminal Rules of Practice which lays down who are the persons to whom notice should be given under S. 422; and it is clear that in appeals against compensation orders the District Magistrate is the person to whom notice must be given. This is the view taken by the learned Judges in *Guruswami Naicken v. Thurumurthi Chetty* 2. In that case the appeal was heard by the Joint Magistrate and the Court pointed out that notice of the appeal should have been given under R. 60 to the District Magistrate.

What the procedure of the District Magistrate should be on receiving such a notice does not arise in this case because no notice was in fact given to him, the reason being that he

1, (1915) I. L. R. 38 Mad. 1091.

2, (1914) 27 M. L. J. 629.

himself heard the appeal. It is unnecessary to say that when an officer is hearing an appeal judicially there is no necessity for him to give notice to himself. It necessarily follows therefore that in this case there has been no breach of provision of S. 422 requiring notice to a particular officer and this objection therefore fails. This petition is therefore dismissed.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE

NAPIER.

Subramania Karayalam and others ... *Appellants* (Defts.)*

v.

V. M. Sivasubramania Pillai & others ... *Respondents (Plffs.)*

Landlord and tenant—Ryotwari pattadar—Suit in ejectment—Claim of occupancy right by tenants—Onus of proof.

In a suit by a Government pattadar of ryotwari lands to eject his tenants therefrom after due notice to quit, the onus of proving the existence of a right of permanent occupancy lies heavily on the tenants setting up the right.

Seluralnam Iyer v. Venkatachela Gounden (1) followed, *Veeranman Ambalam v. Annasami Iyer* (2) not followed.

Appeal against the decree of the Court of the Subordinate Judge of Tinnevely in O. S. No. 68 of 1915.

C. Madhavan Nair for appellants.

A. Krishnaswami Aiyar and A. Swaminatha Aiyar for 1, 3 and 4 respondents.

The Court delivered the following

Judgments :—*Sadasiva Aiyar, J.*—31 of the 112 defendants impleaded in the suit in the Lower Court have preferred this appeal. The 1st plaintiff who died after the institution of the suit was the trustee of the famous Siva temple at Tinnevely. The 2nd plaintiff obtained a lease from him of the plaint lands for a term of 9 years under the lease deeds, the first lease term beginning in fasli 1319.

The only question in this case is whether the defendants have got a right of occupancy in the plaint lands. The lands are mainly ryotwari lands and the temple has got a ryotwari pattah in respect of the lands. When tenants claim a right of

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1. (1920) 43 M. 567 (P. C.)

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2. (1911) 21 M. L. J. 846.

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occupancy in such lands, they ought to prove that right by strong evidence, the burden of proof lying heavily on them. The observations in *Veeranan Ambalam Peria Karuppan Ambalam v. Annaswami Iyer*¹ and *Venkatachala Goundan v. Rangaratnam Iyer*² that even a ryotwari pattadar when he sues as plaintiff and seeks to eject his tenants should prove his title to eject, that is, should establish that his tenants have no occupancy rights cannot be now accepted as good law. Those observations were not followed in *Ananthapadmanabha Pillai v. Gopalakrishna Iyer*³ by my learned brother and Seshagiri Aiyar, JJ. and by my learned brother and myself in *Aiyappa Naicker v. Thirumalaiappa Mudaliar*⁴. The matter is now concluded by the decision of their Lordships in *Sethuratnam Aiyar v. Venkatachala Gounden*⁵ which decision has been considered and construed, and I need not add, followed by the Chief Justice and myself in Appeal No. 139 of 1919. The Subordinate Judge has given good reasons in paragraph 26 of his judgment for his conclusion that the appellants have wholly failed to discharge the burden of proof which lay upon them. I might add that I do not agree with his observations in favour of the defendants found in paragraph 23 of his judgment that the term 'Swamibhogam' implies that the person who is entitled to receive swamibhogam is not the owner of the kudivaram interest. On the other hand, the term usually implies that the ownership in the soil does vest in the person who is entitled to swamibhogam. Two of the defendants other than the appellants have themselves given evidence as P. Ws. 14 and 15 which favours the plaintiff's case. I would therefore dismiss the appeal with costs.

Napier, J.

Napier, J. :—I agree.

1. (1911) 21 M. L. J. 845.

2. (1913) 24 M. L. J. 571.

3. (1915) M. W. N. 277.

4. (1919) 37 M. L. J. 238.

5. (1920) 39 M. L. J. (P. C.)

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR JOHN WALLIS, CHIEF JUSTICE AND MR. JUSTICE OLDFIELD.

The Chief Commissioner of Income-tax
(Board of Revenue) Madras

... *Appellant.*⁺

v.

The North Anantapur Gold Mines, Ltd

... *Respondent.*

Income-tax Act, Act VII of 1918, Ss. 51, 52—Scope and Construction of—Specific Relief Act, S. 45—Whether and when an application for Mandamus lies against the Chief Revenue authority—Government of India Act, 1915, S. 106—Effect of, on the right to apply for Mandamus—Whether Chief Revenue authority is bound to refer a question of law on the application of the assessee, if it is not frivolous.

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An application under S. 45 of the Specific Relief Act to direct the Chief Revenue Authority to make a reference under S. 51, of the Indian Income-tax Act 1918 does not lie in the High Court especially where the question raised has been considered by the Chief Revenue authority and there is no suggestion of any want of good faith on its part.

The issuing of the writ of mandamus to secure the performance of a public duty where no adequate remedy existed by action or otherwise and the substituted jurisdiction to issue orders under S. 45 of the Specific Relief Act are matters of original jurisdiction.

The High Court in making an order under S. 45 Specific Relief Act against the Chief Revenue Authority would be exercising original jurisdiction "in a matter concerning the revenue" within the meaning of S. 106 of the Government of India Act 1915.

S. 51 of the Indian Income-tax Act, 1918 alters to some extent S. 106 of the Government of India Act and confers jurisdiction on the High Court to proceed on a reference from a revenue authority under the provisions of the section.

An application for an order under S. 45 of the Specific Relief Act against the Chief Revenue Officer is a proceeding against him within the meaning of S. 52 of the Income-tax Act. *In re* Onward Binding Society 1891, 2 Q. B. 46 followed.

Consequently, independently of S. 106 of the Govt. of India Act, S. 52 of the Income-tax Act prohibits among other things any application against the Chief Revenue Authority under S. 45 of the Specific Relief Act in respect of anything done by him in good faith.

"Anything done" in S. 52 includes also anything omitted to be done.

Full effect will be given to the language employed by the legislature in S. 51 of the Income-tax Act by giving the Revenue Authority, which is entrusted with the assessment, the duty of deciding whether and to what extent it requires assistance in making the assessment.

The decisions of English Courts afford guidance in this country for the decisions of questions of law, subject to just exceptions.

Semble:—There are not sufficient grounds for holding that the effect of S. 51 of the Income-tax Act is to partially repeal S. 106 of the Government of India Act even to the limited extent of allowing the High Court to exercise original jurisdiction when there are allegations of bad faith against the Chief Revenue Authority.

⁺ O. S. No. 1 of 1921.

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On appeal from the judgment dated the 11th November 1920 of the Honourable Mr. Justice Kumaraswami Sastri passed in the exercise of the ordinary Original Civil Jurisdiction of the High Court. In the matter of the Indian Income-tax Act VII of 1918, and In the matter of the Specific Relief Act I of 1877, S. 45 *in re* the North Anantapur Gold Mines Ltd.

The Advocate General (C. P. Ramaswami Aiyar) and Government Pleader (C. Madhavan Nair) for the Chief Revenue Authority. The authorities acting under the Income Tax Act are special tribunals created under the Act. Reading Ss. 18, 22, 23, 27 and 52 of the Act together the above will appear clearly. If there was not a wilful declining to exercise the jurisdiction there is no right to issue a mandamus to the Chief Revenue authority under S. 51. It is the Board that should refer to the High Court and it is discretionary with the Board. With reference to the word "shall" see *Rustom J. Irani v. Kennedy*¹ and 5 Moore P. C. p. 296. Considering the expressions like "fit, think fit" such expressions show that the power is only discretionary. *Sharp v. Wakefield*², *Rex v. Port of London Authority : Kynock Ltd. Ex parte*³, *Rex v. Marshland Smeeth and Fen Dist. Commissioners*⁴; 86 L. T. 589 gives the scope of the mandamus jurisdiction. See also *Rex v. Cothan*⁵; 16 Q. B. 381 at 392. Spelling on injunctions 1384 : *Julius v. Lord Bishop of Oxford*⁶, *Gell v. Taja Noora*⁷. The Court will not exercise the right of mandamus against courts or quasi judicial bodies : *Prosad Chander De v. Corporation of Calcutta*⁸, 7 H and N. p. 178 : 8 B and C. p. 137 : 4 B and C, p. 844.

It is clear that in this matter there was a hearing by the Board and a Judgment by them.

The Government of India Act 1915 S. 106 (2) excludes the original jurisdiction of the High Court on matters of Revenue.

(*The Chief Justice*. Is it contended that S. 51 of the Income Tax Act is : *ultra vires* ?)

Both S. 51 of the Act and S. 106 (2) of the Government of India Act should be read together.

1. (1901) I. L. R. 28 Bom. p. 396 at p. 400.

2. (1891) A. C. at p. 179.

3. (1919) 1 K. B. 176 at p. 186.

4. (1920) 1 K. B. 165 pp 164, 165.

5. (1898) 1 Q. B. 802 at p. 806.

6. (1880) 5 A. C. 214.

7. (1903) I. L. R. 27 Bom. 307 at p. 349.

8. (1913) I. L. R. 40 Cal. p. 836 at p. 844.

"Of and concerning" have been construed to mean "relating to". The origin of the inhibition of jurisdiction was from the practice of the Court of Exchequer having exclusive jurisdiction in matters of revenue. 1 Anstruther 205 (note) See 21 George III ch. 8 and preamble : 37 George III repeats the provision. 39 and 40 George III C. 79 S. 2 : 24 and 25 Vict. Ch. 104 S. 9 reproduces the same. 1 Strange 153 (Equity Side) does not touch this question. See 11 B. L. R. p. 250 ; 6 Moore P. C. p. 257 at p. 282 : 4 M. I. A. 353 *Collector of Madras v. P. Chidambaram* ¹.

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The Government Pleader (C. Madhavan Nair continued) Reference was made to *Best & Co., Ltd. v. Collector of Madras*. ² As to the form of mandamus see 86 L. T. p. 589. The order has to issue to act and determine according to law. *In the matter of Purna Chandra Dutt*, ³ (per Woodroffe, J.) was a case where an application calling upon the examiners for the examination of attorney to revalue the papers was disallowed.

R. N. Aiyangar for the Respondent : The question to be referred must be one necessary for the disposal of the case. This will appear further from the last portion of Cl. 3 of S. 51. Unless the decision of the question is unnecessary for the decision of the case, the Chief Revenue Authority is bound to refer the question to the High Court.

Even if there is a discretion vested in the authority a mandamus can issue if the limits of the discretion have been exceeded. *Leslie Williams v. Haines Thomas Giddy* ⁴ *The Queen v. Vestry of St. Pancras* ⁵.

The Finance Act of 1915 relating to excess profits has a section similar to S. 51 of the Indian Income Tax. If the contention of the other side, is right there is no difference between both parts of sub. S. (1) of S. 51. In that case, there will be an absolute discretion to refer to the High Court under both parts of the sub-section. The discretion under the later portion is a limited discretion and not an absolute one as under the first portion of the sub-section. *Smith & Co v. Greenwood*, ⁶ referred to. As to the place where the income 'arises', the profits arise only when the commodity is sold.

1. (1875) 1 L. R. 1 Mad. p. 89.

3. (1908) 1 L. R. 36 Cal. at p. 922.

5. (1889) 24 Q. B. D. 371 at p. 375.

2. 35 M. L. J. 23.

4. (1911) 21 M. L. J. 641 (P.C.)

6. (1920) 3 K. B. 275.

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S. 33 (1) of the Indian Income Tax corresponds to the English Finance Act 1915 S. 31 (2).

On the question of mandamus see Pollock and Mulla's Contract Act p. 966. *Gell v. Taja Noora* ¹, *Sharp v. Wakefield* ² referred to. On the question of S. 106 of the Government of India Act, S. 131 of the Act gives power to the Indian Legislature to modify its provisions. S. 51 to some extent modifies the provisions of S. 106 of the Government of India Act.

The application for mandamus is really on the appellate jurisdiction of the High Court. So S. 106 does not affect the question. *Nilmoni Singh Deo v. Taranath* ³, *Chappen v. Moidin Kutti* ⁴ *Hari Bhanji v. Secy. of State for India* ⁵ explain what are "matters concerning revenue."

The Advocate General in reply referred to 9 H L C 246 ; *Duke v. Ramessor Malia* ⁶ under Bengal Municipal Act shows that the Municipality is to be satisfied and not the Court. In this case the Chief Revenue Authority has to be satisfied that the application is frivolous or that the reference is unnecessary.

The High Court gets a special jurisdiction to deal with a reference after a reference is made by the Chief Revenue Authority under S. 51 of the Income Tax Act. S. 106 of the Government of India Act is not expressly repealed by S. 51 and it is not one of the enactments specifically repealed.

A Krishnaswami Aiyar amicus curiae "Necessary" in S. 51 does not mean necessary in the Board's opinion, but necessary for the disposal of the case. *Reg. v. Cotham* ⁷.

The Board of Revenue is the final tribunal on facts on the law, the question must be referred if the Board is satisfied that its decision is necessary for the disposal of the case if it is not frivolous. *Board of Education v. Rice* ⁸ *Melbourne Tramway & Omnibus Coy. v. Mayor of the City of Fitzroy* ⁹. *The Queen v. Boteler* ¹⁰. *Rex v. Stepney Corp'n* ¹¹. *The Queen v. Vestry of St Pancras* ¹². *Julius v. Bishop of Oxford* ¹³ does not touch the question.

The term "frivolous" has been the subject of judicial decision under the Rules of the Supreme Court. It has been

1. (1908) I. L. R. 27 Bom. 307 (320)

2. (1891) A. C. 173 179.

3. (1882) I. L. R. 9 Cal. 295.

4. (1879) I. L. R. 22 M. 68 at p. 82.

5. (1879) I. L. R. 4 Mad. 344 at p. 354.

6. (1899) 26 Cal. 811 at 818.

7. (1898) 1 Q. B. 802

8. (1911) A. C. 179

9. (1901) A. C. 163, 161,

10. (1864) 4 B & S 958.

11. (1902) 1 K. B. 317,

12. (1889) 24 Q. B. D. 371..

13. (1880) 5 A. C. 222.

held to mean abuse of the powers of the Court. As to mandamus in case of discretionary powers see also *Boaler in re* ¹ at p. 38 "Frivolous" as to what it means reference was made to *Dyson v. Attorney General* ² *Att. Genl. of the Duchy of Lancaster v. L. & N. Ry.* ³.

Two safeguards are provided by the section for preventing an unnecessary abuse of the power of the assessee to ask for a reference to the High Court.

With reference to the nature of the jurisdiction under S. 51 See 25 C. W. N. p. 80 at p. 84. The question arose there whether a Vakil can appear on the reference ; it was held that he could because the jurisdiction exercised under S. 57 was in the appellate jurisdiction. S. 45 of the Specific Relief Act gives a statutory power to the High Court.

The proceeding under S. 45 of the Specific Relief Act which attracts the appellate jurisdiction of the High Court under S. 51 of the Income Tax Act is also a matter of appellate jurisdiction.

A Stamp Act reference is a matter of appellate jurisdiction because S. 57 of the Stamp Act gives the High Court power to decide on a reference and it cannot be original because it would be opposed to the provision in the Councils Act of 1861 corresponding to S. 106 (2) of the present Government of India Act. It is further clear because under that Act, there was no provision corresponding to S. 131 of the present Government of India Act and there was no power to repeal any provisions of that Act in the Government of India. Cl. 2 of S. 1 of the Government of India Act enacts an exception to Cl. (1) of the section.

(C. J. S. 106 (2) is merely a reproduction of the older legislative provisions appearing from the statute of 1781).

The jurisdiction under S. 45 of the Specific Relief Act will not come under any class of original jurisdiction under S. 11 or S. 13 of the Letters Patent.

S. 12 of the Letters Patent gives the original civil jurisdiction only in respect of suits within certain local limits. So all jurisdictions conferred by special Acts on the High Court are not of the nature of the original jurisdiction.

If there is an obligation on the Chief Revenue Authority to refer to the High Court, a question, there is undoubtedly power

1. (1915) 1 K. B. 21.

2. (1911) 1 K. B. 410 at p. 420.

3. (1892) 3 Ch. 274.

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in the High Court to enforce the Chief Revenue Authority to refer the question to the High Court.

The Advocate General replied :

S. 51 deals only with the questions that have arisen because of the words "has arisen" in the first portion of S. 51 (1); so that the last portion "that a reference is unnecessary" can only refer to a question which has arisen in the case.

A. Krishnaswami Aiyar :

The expression "a question has arisen" only refers to a question raised in some earlier stage of the proceedings which became unnecessary after the finding on the facts by the Chief Revenue Authority.

The Court delivered the following

Wallis, C. J.

Judgments :—*The Chief Justice :—*This is an appeal from an order passed by Kumaraswami Sastri, J. under S. 45 of the Specific Relief Act directing the Chief Commissioner of Income-tax to make a reference to the High Court under S. 51 of the Indian Income Tax Act 1918, and raises questions of importance as to the jurisdiction of the High Court to make such an order. The case has been very fully argued before us by the learned Advocate-General for the appellant and by Mr. Aiyangar for the respondent and we also heard Mr. A. Krishnaswami Ayyar for other persons who have applications of a similar nature pending.

The powers conferred on a High Court by S. 45 of the Specific Relief Act are in lieu of the power to issue the writ of mandamus inherited from the Supreme Court which is taken away by S. 50, and clause (b) of the proviso makes it clear that the section does not authorise the making of "any order which is otherwise expressly excluded by any law for the time being in force." The Advocate-General contended that the order under appeal is excluded by S. 106 of the Government of India Act 1915, and also relied on the provisions of S. 52 of the Indian Income Tax Act which apparently were not brought to the notice of the learned Judge. The Government of India Act is a consolidating statute which in S. 106 has re-enacted the prohibition which was expressly imposed upon the Supreme Court of Bengal in 1780 after the well-known conflict with Warren Hastings and was applied by reference to the Supreme Courts of Madras and Bombay when they were erected in the early part of last century. The prohibition as contained in S. 8

of the East India Company Act 1780 was in the following terms "the said Supreme Court shall not have or exercise any jurisdiction in any matter concerning the revenue or concerning any act or acts ordered or done in the collection thereof according to the usage and practice of the country, or the regulations of the Governor-General in Council," and a very wide construction was put upon the section by the Privy Council in *Spooner v. Juddow* ¹. This prohibition never applied to the Company's Courts, and, when the Supreme Court and the Sudder Courts were superseded by the High Courts under the Act of 1861 and the Letters Patent issued pursuant thereto, a question arose in *Collector of Sea Customs v. P. Chidambaram* ² as to whether the prohibition still attached to the High Court in the exercise of the original jurisdiction conferred upon it. Morgan, C. J. thought it did. Innes and Kernan, JJ. thought it did not, though for different reasons. The framers of the Government of India Act 1915 were obviously of the same opinion as Morgan, C. J. as they treated the prohibition as still in force and reenacted it in S. 106 of the Government of India Act as follows :—

"The High Courts have not and may not exercise any original jurisdiction in any matter concerning the revenue, or concerning any act ordered or done in the collection thereof according to the usage and practice of the country or the law for the time being in force." The only difference is that whereas the Act of 1780 said that the Supreme Court should not have or exercise any jurisdiction, the new Act says the High Court has not and may not exercise any original jurisdiction in any matter concerning the revenue.

Now, the issuing of the writ of Mandamus to secure the performance of a public duty where no adequate remedy existed by action or otherwise was, it seems to me, clearly an exercise of original jurisdiction. It was a proceeding originating in the court issuing it, and might be directed in a proper case to any class of public officer, executive or judicial. It must also be regarded as having been within original jurisdiction of the Supreme Court because that court had no appellate jurisdiction. Similarly I think that the substituted jurisdiction to issue orders under S. 45 of the Specific Relief Act is original jurisdiction. It may in terms be directed to any person

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1. 4 M. I. A. 353.

2. (1875) I. L. R. 1 p. Mad. 89.

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holding a public office and to any corporation as well as to any inferior court of judicature. The nature of the jurisdiction exercised is the same in each case, and must in my opinion be considered an exercise of original jurisdiction. If this be so, I am unable, with great respect, to agree with the learned Judge that in making the order prayed for, we should not be exercising original jurisdiction "in matter concerning the revenue". The case appears to me to come within the plain meaning of the section, and this was not very seriously disputed. The learned Judge has referred to some observations of Sir Thomas Strange in *Venkata Runga Pillai v. The East India Coy.* ¹, but his attention does not appear to have been called to the very wide interpretation put upon the section by the Privy Council in *Spooner v. Juddow* ².

As already observed the effect of the proviso to S. 45 was to leave the old statutory restriction in full force. This, however was not one of the statutory provisions which the Indian Legislature was prohibited from altering under the Indian Councils Act, 1861. and S. 131 (3) of the Government of India Act, 1915, and the fifth schedule thereto expressly recognises, the power of the Indian Legislature to repeal or alter the provisions of S. 106. Now, these provisions have been to some extent altered by S. 51 of the Indian Income Tax Act, 1918, which obviously confers jurisdiction on the High Court to proceed on a reference from a revenue authority under the provisions of the section. That section not only enables the Revenue Authority to make a reference to the High Court but requires it to do so "unless it is satisfied that the application is frivolous or that the reference is unnecessary."

The question then is whether we have any jurisdiction to issue any order to the Chief Revenue authority under S. 45 of the Specific Relief Act with a view to enforcing the due discharge of the duty imposed upon it by the section, and in dealing with this question we have to consider, not only S. 106 of the Government of India Act, but also the provision of S. 52 of the Income-Tax Act itself which provides that "no prosecution suit or other proceeding shall lie against any Government Officer for anything in good faith done or intended to be done under this Act". That an application for an order under S. 45 of the Specific Relief Act against the Chief Revenue

(1.) 1 Strange 153.

(2.) 4 M. I. A. 453.

Officer is a proceeding *against* him within the meaning of the section appears to be settled by the high authority of Bowen and Kay, L. JJ. in *In re Onward Building Society* ¹ where an application against a liquidator of a company directing him to register shares was held to be within the prohibition in S. 87 of the Companies' Act against proceeding with any "suit action or other proceedings against the company". Lord Justice Bowen said "The question whether a proceeding under S. 35 is a proceeding against the company appears to me to admit of but one answer *viz.* that it is. That section gives a summary mode of enforcing rights which might have been prosecuted by a suit in Chancery or possibly by an action for a mandamus at common law. It would be impossible to say that, if the circuitous proceeding would have been a proceeding against the company, that the compendious one is not so also." Kay, L. J. also uses language showing that he regarded an application for a mandamus as a proceeding against a company. Consequently, independently of S. 106 of the Government of India Act, S. 52 of the Income Tax Act prohibits among other things, any application against the Chief revenue authority under S. 45 of the Specific Relief Act in respect of anything done by him in good faith. That the words "anything done" in an act of this kind include also anything omitted to be done is also well settled. See *Jolliffe v. Walasoyo*, ¹ and *Rev. J. Williams In re* ² and the provision in S. 3 (2) of the General clauses Act, 1897 that "words which refer to acts done extend also to illegal omissions."

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There is no suggestion of any want of good faith on the part of the Chief Revenue Commissioner in the present case, and therefore, the present proceeding is in my opinion prohibited by the express terms of S. 52 of the Act itself. The effect of S. 52 is to extend to subordinate courts and to the High Court in the exercise of its appellate jurisdiction the prohibition imposed upon the High Court in the exercise of its original jurisdiction by S. 106 of the Government of India Act as regards acts done by the revenue authority in good faith. Further, as at present advised I am not satisfied that there are any sufficient grounds for holding that the effect of S. 51 is to partially repeal S. 106 even to the limited extent of allowing

¹ 1891. 2 Q. B. 468.

² (1873) L. R. 4 C. P. 62.

³ (1884) 9 A. C. 484 : 58 L. T. P. C. 71.

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the High Court to exercise Original Jurisdiction when there are allegations of bad faith. It is however unnecessary to decide this question.

Much argument has been addressed to us as to the nature of the duty imposed on the Chief Revenue Authority and as to the meaning of the words 'frivolous' and 'unnecessary'. In particular it has been argued that, unless he is satisfied that the application is frivolous, he is bound to make the reference, unless the point in his opinion either does not arise or has already been decided. The ordinary legal meaning of the word "necessary" as appears from Stroud's Judicial Dictionary is "reasonably required for the disposal of the case", and I am not satisfied that it was intended to use the word in the section in any more restricted sense. In England the assessee can ordinarily claim to have a case stated as of right, but 5 and 6 Geo. 5 Ch. 89, S. 42, dealing with the Excess Profits Tax, provides that the Commissioners "unless they are of opinion that the application is frivolous or vexatious or relates to a matter already decided by the Board of Referees" shall refer the case to a Board. I think it is very likely that this part of S. 51 was modelled on that section, and that the legislature substituted the word "necessary" with the intention of giving the Revenue Authority a wider discretion.

As regards this particular case I will only say that, while the Commissioner has rightly based his decision on the language of the Indian section which differs materially from the corresponding section of the English Act, he has fallen into error in supposing that in *Inambandi v. Mutsaddi*¹ the Privy Council deprecated the practice of referring to English decisions which are the basis of so much of our law in India. The decisions in question were American decisions and were correctly described as foreign, an adjective which is inapplicable and would certainly not have been applied by the Privy Council to the decisions of the English courts. As regards Income Tax the Indian Act generally follows the lines of the English Act, and where the provisions are similar English decisions are the best guide to their meaning. The Revenue Authority no doubt may not always find it easy to apply them, and that is one reason why the Act empowers and requires it to make a reference to the High Court in appropriate cases. The appeal

1. (1918) 45 I. A. 73.

must be allowed and the application dismissed with costs throughout.

Oldfield, J. :—I agree with the judgment just delivered and as regards the application of S. 106 Government of India Act, 1915, have nothing to add.

The alternative ground, on which the judgment under appeal has been supported, is that under S. 51 (1) Act VII of 1918 the making of the reference asked for is in the words of the proviso to S. 45 Specific Relief Act clearly incumbent on the Chief Revenue authority, against whom an order under the latter section is claimed; and it is thus necessary to consider the wording of the former closely, since it is on it and not on any general rule as to the duties imposed by other statutes in different or wider terms on public officers or public or associated bodies that our conclusion must rest. So far moreover as the numerous well known cases, which have been laid before us require adherence, whatever the nature of the duty to be performed or procedure to be employed, to the principle of natural justice and an honest exercise of the discretion conferred, they are not in point, because their requirements were clearly fulfilled in the present case, the commissioner of Income Tax, the authority concerned, having, as his order shows, heard counsel and having dealt adequately with the English decisions relied on.

It accordingly is not material that, after distinguishing these decisions, he further, in order to fortify his position relied on the reference to foreign decisions in the judgment of the Judicial Committee in *Imambandi v. Mutsoddi* ¹ as justifying a general refusal to follow those of the English courts. In doing so he was perhaps influenced by the interpretation placed on that reference in one of the judgments in *Seeni Nadan v. Muthusami Pillai* ². But in view of the context and of the practice of the Judicial Committee I agree that the word 'foreign' cannot have been used by it in the sense proposed and that the decisions of English Courts must, subject to all necessary exceptions, continue to afford guidance in India. In particular, where, as in the present case, a new Statute expressed in exacter language and, it would appear, administered in a stricter manner than the former law is in question, the assist-

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1. () L. R. 45 I. A. 78.

2. () I. L. R. 42 Mad. 821.

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ance afforded by English authorities on the construction of what are, due allowance made for different wording and local conditions, in many respects similar statutes, cannot safely be rejected ; and, further, as in cases, in which a reference to this Court is found necessary that assistance will presumably be accepted here, the same foundation must be adopted for our decisions and those of the revenue authorities, if a consistent system of Income Tax administration is to be reached.

To return to the section, decisions directly relevant to its construction have not been cited ; and their absence is natural, because the right conferred by it on the assessee corresponds with nothing in the previous Indian Income Tax Act and there is, so far as we have been shown, no provision in any other statute in the same or equivalent terms, by which any similar duty is imposed. We have therefore in the absence of "any thing to modify, anything to alter, anything to qualify the language to construe it in its ordinary and natural sense". Vide *Vestry of St. John Hampsted v. Cotton* ¹ and the construction proposed before us by the Assessee seems to be inconsistent with our doing so. The material part of S. 51 (1) runs:—

The Chief Revenue Authority shall refer any question on the application of the assessee, unless it is satisfied that the application is frivolous or that a reference is unnecessary," and it is with the latter alternative that we are directly concerned. For the assessee before us contends that "unnecessary" means only "unrelated to any issue arising necessarily in the course of assessment" and that the court is to determine whether the issue in question is of that nature. There are two fundamental objections to this, which I think, are valid ; firstly that it refuses effect to the requirement that the Revenue Authority shall be satisfied, substituting as the test of the necessity for the reference that this court shall be so ; and secondly that it restricts the meaning of "unnecessary" inconsistently with the ordinary use of the word. On the first of these there is no reason for assuming that frivolous applications excepted, this court has been given an unrestricted jurisdiction, where previously it had none ; on the second, it is the reference, not a determination of the question referred, which is described as unnecessary and there is no reason for excluding from the class of questions under contemplation those, which the Revenue

1. (1886) 12 A.C. 6.

Authority in fact does determine unaided. Shortly the Assessee's argument would be justified, unless if the section simply made a reference obligatory, unless it were unnecessary; and it could, if that had been the intention, have easily been worded in that way with a provision for an absolute right to appeal or to have a case stated. On the other hand, if we leave to the Revenue authority, which is entrusted with the assessment, the duty of deciding whether and to what extent it requires assistance in making it, we give full effect to each part of the language employed. Accepting the latter alternative, I concur in allowing the appeal and in the order proposed.

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Appeal allowed.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR JOHN WALLIS, C. J., MR. JUSTICE AYLING
AND MR. JUSTICE KRISHNAN.

Deputy Commissioner and Secretary :

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... *Referring Officer.**

v.

Messrs. Lakshmidoss Purushotham & Co.,

Calicut

... *Assessee.*

Excess Profits Duty Act 1919—Act does not require duty should be assessed within the year for which it is imposed—Provisions of the various acts compared and discussed—Scope of S. 19 Excess Profits Duty Act.

The Excess Profits Duty Act 1919 does not require that the Excess profits duty should be assessed within the year for which the duty is imposed.

The provisions of the various income-tax Acts compared and discussed.

S. 19 of the Excess Profits Duty Act only provides, for the protection of the tax payer, that the profits of the business shall not be chargeable both with supertax and excess profits duty, but with whichever is higher. It has no application to a case in which profits are chargeable only with excess profits duty and not with supertax.

Case stated under S. 51, of the Indian Income-tax Act read with S. 15 of the Excess Profits Duty Act by the Deputy Commissioner and Secretary to the Chief Commissioner of Income-tax, Madras in his letter C. R. No. 50 dated 3—1—21.

The Advocate General (C. P. Ramaswami Aiyar) for the Boards.

E. L. Thornton, A. Krishnaswami Aiyar, M. Patanjali Sastri and T. S. Krishnaswami Ayengar for Respondents.

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The Court delivered the following

Judgment :—The question referred to us is whether the Excess Profits Duty Act, 1919 requires the duty to be assessed within the year from the 1st April 1919 to 31st March 1920 for which the duty is imposed. A comparison of the Act with the earlier Income-tax Acts makes it quite clear that this was not the intention of the Legislature. It is expressly provided in S. 4 of the Indian Income-tax Act, 1886 S. 3 of the Super Tax Act 1917, and S. 14 of the Income-tax Act, 1918 that the tax under each of these Acts shall be paid or collected in the year for which it is imposed and this necessarily implies that the assessment must also be within one year. Consequently under the Acts of 1886 and 1917, income which escaped assessment within the year went free, but in S. 25 of the Act of 1918 it was for the first time provided that in cases governed by that Act, it might be assessed in the following year, and the Super Tax Act 1917 has recently been amended to the same effect. On the other hand the Excess Profits Act 1919 which we have to construe contains no provision that the tax is to be paid within the year but simply provides in S. 4 that it is to be "charged, levied and paid", and the legislature whilst making Ss. 21 to 24 and 26 to 27 as well as other sections of the Indian Income-Tax Act 1918 applicable in proceedings under this Act has omitted S. 25 which, as already mentioned, provided for the assessment in the following year of income which has escaped assessment in any year. The omissions of any provision that the tax should be paid within the year and of any provision for the assessment of income which had escaped assessment on the year itself are conclusive indications that it was the intention of the legislature to depart from the scheme of the earlier Acts and not to require assessments and payment within the year. The reason, as pointed out by the learned Advocate-General, no doubt, was that the assessment of the standard profits under S. 9 for the purposes of calculating the Excess Profits Duty was a complicated matter and in many cases could not be completed within the year. Consequently the legislature considered it a sufficient limitation to incorporate by reference, the provisions in S. 30 (5) of the Indian Income-tax Act 1918 that no proceedings for recovery of the tax should be taken after the expiration of one year from the last day of the year in which any demand is made under the Act.

It has however been argued that as the income with which we are dealing is not chargeable with super-tax under the Act of 1917 because it was not assessed to super-tax within the year, it must also be held exempt from Excess Profits Duty under S. 19 of the present Act. That section merely provides for the protection of the tax-payer, that the profits of any business shall not be chargeable both with super-tax and excess profits duty, but with whichever is the higher, and has no application to a case in which profits are chargeable only with excess profits duty and not with super-tax. It does not relieve profits from the liability to Excess Profits Duty by S. 4 unless such profits are chargeable with super-tax and the super-tax exceeds the Excess Profits Duty. The answer must be that it is not necessary that the Excess Profits Duty should be assessed within the year. The assessee will pay Costs to Crown Rs. 250.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR JOHN WALLIS, C. J., MR. JUSTICE AYLING AND MR. JUSTICE KRISHNAN.

The Deputy Commissioner and
Secretary to the Chief Com-
missioner of Income-tax,
Madras.

... Referring* Officer.

v.

Messrs. Bhanjee Ramjee and Co.

... Assessee.

Indian Income Tax Act (Act VII of 1918) Ss. 3 and 33 (1)—Resident of Cochin State, having principal place of business in Cochin State and doing large part of his business in British Cochin—Profits made by his business connection in British India S. 33 (1) latter part, effect of—Whether the agent only person assessable—Nonresident whether British subject or foreigner liable to income tax.

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The petitioner was a resident of and had his principal place of business in Cochin State in Muttancheri which adjoins British Cochin and practically forms one town with it. He did a large part of his business in British Cochin i. e., contracts for the supply of goods were entered into and signed at the offices of firms in British Cochin and the goods were delivered at the jetties of the purchasers; the sale proceeds were paid to the firm's agent or rather duly authorised servant in cash in British India or by cheques which are cashed in Banks in British India.

In these circumstances the profits and gains thus made by the petitioner are profits and gains arising to the petitioner through or from his business connection in British India and he is assessable to income tax in respect of the profits and gains under S. 33 (1) of the Indian Income Tax Act.

* Ref. Case. No. 4 of 1921, decided on 19th April, 1914.

The Court delivered the following.

Judgment :—This is an appeal by defendants 1 to 4 in the suit which was brought by the plaintiffs on the footing of two usufructuary mortgages, Exs. A and B, in which the father-in-law of the 1st plaintiff and the father of the 2nd plaintiff were the mortgagors and the 1st defendant was the mortgagee. The plaintiffs claim that the mortgage debt having been completely discharged they are entitled to the possession of the mortgaged lands by ejection of the defendants. They also claim an account.

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The mortgage deeds are dated respectively 27th September 1892 and 28th April 1893. The written statement filed by the defendants admit that the father-in-law of the 1st plaintiff, the 2nd defendant and certain minors became indebted up to 13th March 1887 in the sum of Rs. 560 in respect of the plaintiff mentioned registered deeds of mortgage with possession and they executed a settlement of account. They also file an account and plead that the sum of Rs. 950 odd is still due to them and that the plaintiffs cannot redeem without paying this sum.

The issues, as originally settled, were for accounts and on the question of non-joinder of certain alleged necessary parties. But on remand the District Munsif framed an additional issue which is the point taken in the second appeal before us. The issue runs as follows : "Are the suit mortgages void on account of non-enfranchisement and, if so, is the plaintiff's suit in time and the claim for possession of the lands not barred?" Both the lower courts have held that the plaintiffs are entitled to redeem.

The suit lands were unenfranchised service inam lands at the date of Exs. A and B though they have been enfranchised since. The mortgages therefore are by the provisions of S. 5 of Madras Act III of 1895, clearly void; and there is ample authority for holding that the provisions of S. 43 of the Transfer of Property Act cannot be applied so as to save a transaction of this sort. Vide *Narahari Sahu v. Siva Korithan Naidu* ¹, *Bachu Ramayya v. Phari Satchi* ² and *Ramayya v. Jagannadham*.¹³

The appellants contend that, as the mortgages are void, the defendants having been in possession continuously since 1892 to the date of the suit in 1914 have acquired an absolute title to the suit lands and cannot be dispossessed by the plaintiff

¹ (1918) M. W. N. 415.

² (1913) M. W. N. 999.

³ (1915) M. W. N. 838.

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or anybody else. The respondents, on the other hand, contend that while admitting that the defendants have been in possession for over twelve years they have not prescribed for any higher title than that of mortgagees in possession and are therefore liable to be redeemed and dispossessed on accounts being taken. The question for decision is which of these views is correct.

The learned vakil for the respondents relies largely on *Javerbhai Jorabhai v. Gordhan Narsi*¹ where a house and certain properties were mortgaged and the mortgage was void under the provisions of the Bhagdari Act, Bombay Act V of 1862. The mortgage deed however contained a covenant for compensation payable to the mortgagee in the event of dispossession. The defendants contended that the mortgage being void the suit was barred by limitation. It was however held that the covenant was a collateral contract independent of the invalid mortgage and that the mortgagee could recover on it. The learned Judges in that case however went further and as justifying the plaintiffs claim for compensation for disturbance under the covenant, they decided (Page 372) that the possession of the plaintiff from 1897 to 1909 gave him an absolute title to the limited interest of a mortgagee in possession, and "in assertion of that right held adversely to the defendants who continuously attorned to him". The case reported in *Adam Umar v. Bapu Bawaji*² is authority for the proposition, if any is needed, that possession obtained through a transaction which the law prohibits and declares to be void is adverse, and the learned Judges there point out that it is just such possession originating without colour of title which is contemplated by the law of limitation. cf *President and Governors of Magdalen Hospital v. Knotts*³ where the possession obtained under void leases was held to be adverse. In *Budesab v. Hammanta*⁴ it was held that a partial interest in land may be lost by adverse possession as well as the whole interest and that the right to such partial interest may be asserted by suit. The learned Judges refer to two Madras decisions apparently with approval, namely *Madhava v. Narayana*⁵ where it was held that adverse possession for 12 years of a limited, i. e., Kanom

1. (1914) L. L. R. 39 Bom. 358,

2. (1909) I. L. R. 83 Bom. 118.

3. (1879) L. R. 4 A. C. 324

4. (1896) I. L. R. 21 Bom. 509.

5. (1885) I. L. R. 9 Mad. 244.

interest in immoveable property is a good plea to a suit of ejectment to the extent of that interest. In *Sankaran v. Periasami* ¹ which is the other case referred to, it was held that possession of a limited interest in immovable property may be just as much adverse for purposes of barring a suit for the determination of that limited interest as is adverse possession of a complete interest in the property to bar a suit for the whole property. Further in *Sundara Gurukkal v. Subramania Archakar* ² (a decision of this court) it was held that by virtue of adverse possession a person does not acquire a higher title than he has prescribed for. There the office of an archaka of a temple and the properties attached thereto were usufructually mortgaged and after the expiration of the period of redemption the mortgagee continued in possession for the prescriptive period. The learned Judges held that the mortgagee acquired only the right of a usufructuary mortgagee and not the right of absolute ownership.

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It appears to us that the decisions quoted above must be followed. There is no evidence in this case that the defendants ever claimed or thought that they were prescribing for the whole interest. The plaint and the written statement, as pointed out above, are based entirely on the void mortgages. It was not till the remand trial before the Munsif that the question of the effect of the possession of the defendants under the void mortgages was raised and considered. No other question was argued in Second Appeal. We must therefore hold that the defendants have not prescribed for any higher title than that of usufructuary mortgagees. In this view, the judgment of the Lower Appellate Court is right and the second appeal must be dismissed with costs.

On the memo. of objections it is argued for the appellants that only 3 years rent and profits can be recovered on the ground that the covenants in an usufructuary mortgage are personal and that, as the title of the true owner is not transferred to the adverse owner who has remained in possession for the period required by the statute of Limitation, cf. *Tichborne v. Weir* ³, the conditions do not affect the latter and cannot be enforced against him. The case in *Pumugu Subbia v. Nukalapati Rami Reddi* ⁴ is also quoted. It is admitted that

1. (1890) I L R. 13 Mad. 467
3. (1892) 67 L. T. 735.

2. (1913) 18 I. C. 860.
4. (1916) 30 M. L. J. 331.

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had the mortgages been valid the 8 year's rents and profits claimed by the respondent would be recoverable. The cases cited deal with the possession of strangers to the true owner and do not apply to the present case, where as pointed out above, the parties all along considered that they occupied the position of mortgagors and mortgagees and the provisions (if any) made for the disposal of the rents and profits of the mortgaged property must have been perfectly well known to them all. It appears to us that consistently with our judgment in the appeal that the parties after the expiration of the period of Limitation in fact occupied the position of usufructuary mortgagors and mortgagees, we must hold that in the circumstances of this case, rents and profits from 1906 to 1914, the date of suit, are recoverable.

The memorandum of objections is therefore allowed with costs; the decree of the District Judge will be modified accordingly and that of the District Munsif restored.

C. A. S.

Second appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE RAMESAM.

Lakshmi Ammal

... *Appellant* (Plaintiff.)*

v.

Kadiresan Chettiar and another

... *Respondents (Defendants.)*

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C. P. C.—Or. 21, R. 58—*Claim petition—Order negating claim—Order dismissing petition for want of jurisdiction—Suit to set aside—Necessity—Termination of attachment followed by fresh attachment, fresh claim petition, and order thereon—Effect.*

On the construction of the order on a claim petition which ran as follows :—“Sale stopped. The claim cannot be investigated by this court. Petition dismissed.”, held that the order did not negative the right set up by the claimant so as to necessitate the institution of a suit within one year to have it set aside

Per Ramesam, J.—Even if the order was one negating the claimants right, in view of the fact that the attachment against which the claim was made had terminated, and that the decree holder had made a fresh attachment followed by a fresh claim petition and a fresh order allowing the claim.

Semble: it was not necessary to have the order set aside within a year.

Second Appeal against the decree of the Court of the Third Temporary Subordinate Judge of Tanjore at Mayavaram in Appeal Suit No. 28 of 1919 preferred against the decree of

the Court of the District Munsif of Mayavaram in Original Suit No. 443 of 1916.

Lakshmi
Ammal
v.
Kadiresan
Chettiar.

K. V. Krishnaswami Aiyar for appellants.

T. M. Krishnaswami Aiyar for respondents.

The Court delivered the following .

Judgments :—*Spencer, J.* :—Relying on the Full Bench case in *Venkataratnam v. Ranganayakamma* ¹ Mr. Krishnaswamy Aiyar asks us to hold that the District Munsif's order dismissing 1st defendant's claim petition on 15-6-14 became final in consequence of 1st defendant's failure to set it aside by instituting a suit within one year. This point was not raised until the present suit reached the stage of the first appeal and might be disallowed on that ground. Spencer, J.

But it may be answered directly as the Lower Appellate Court allowed it to be argued and as we have heard full arguments in this court.

In *Venkatratnam v. Ranganayakamma* ¹, Seshagiri Iyer J, observed. "The language of O. 21, R. 63 leaves little room for doubt that all orders which negative the right set up by the claimant or the decree holder are within the rule."

Was then the District Munsif's order dated 15-6-14 one that negated the claimant's right. It runs thus: "Sale stopped. The claim cannot be investigated by this court. Petition dismissed." The order was thus based on two circumstances, first, that the execution was not proceeded with in the District Munsif's Court, second, that under S. 63 Civil Procedure Code, the only court having jurisdiction to adjudicate on the claim was the Sub-Court. The petition was dismissed, because the District Munsif has no authority to dispose of it and because it became unnecessary to investigate the claim when the sale was stopped. In my opinion this order was not passed under O. 21 Civil Procedure Code which relates to the investigation of claims, but was passed in the course of execution. It did not negative the right set up by the claimant, but it was an order declining to adjudicate either for or against him; and upon the substance of his claim it cannot be treated as an order more against him than against the decree-holder. Under such circumstances 1st defendant

1. (1918) I, L, R. 41 Mad. 985 : 35 M. L. J. 336.

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—
Spencer, J.

was not bound to set it aside (see *Ponaka Balarami Reddi v. Hazi Mahomed Abdul* ¹. and *Gollamapalli Subbayya v. Sankara Venkataratnam* ²). So far as the order was in substance an order under S. 63 Civil Procedure Code it is worthy of note that this section falls under the head of attachment in Part II of the new Code, the corresponding S. 285 of the Code of 1882 being grouped alongside with Ss. 278 to 283 which related to the investigation of claims and objections and corresponded to Rr. 58 to 63 of O. 21. This fortifies me in the view I have taken that it was not an order disposing of the claim set up by 1st defendant. This is the only point argued and as it fails, the lower appellate court's judgment must be upheld and the Second Appeal dismissed with costs.

Ramesam J.

Ramesam, J. The plaintiff has not sought to base his claim in the plaint on the construction of the order (Exhibit-VII) dated 15-6-14 for which he now contends. It is clear he was content to accept it as an order not negating the claimant's right. Nor was the point raised in the issues or at the trial before the District Munsif. He raised it for the first time before the Sub Judge as respondent. Mr. K. V. Krishnaswami Aiyar contends that he ought to be allowed to raise it as it is a pure question of law. It is true that, when a new question is a pure question of law, it may be allowed to be raised in the discretion of the court hearing the Second Appeal. I do not think that, having regard to the somewhat unhappy language of the District Munsif and the conduct of the parties that we ought to exercise our discretion in favour of the appellant. Mr. T. M. Krishnaswamy Iyer contends that, after the Munsif's expression of his opinion that the Sub Judge was the proper person to decide the claim petition, the decree holder ought to have applied to the Subordinate Judge to be made a party to the enquiry in that court and in the absence of such an application, the order of the Sub Judge (Exhibit II dated 1-9-14) binds him. That it is open to him to so apply seems to follow from *Arimuthu Chetty v. Vyapuri Pandaram* ³. At this stage I am bound to observe that S. 63 of the Code is defective. It does not point out the procedure to be followed by the decree-holders in the inferior court and how the higher court is to pass a decision so as to bind them.

1. (1914) 26 M. L. J. 499.

2 (1917) M. W. N. p. 851.

3. (1911) I. L. R., 35 Mad. 588.

Whether the order of the Sub Judge is to be upheld as the final order on the claim petition or not, I agree with my learned brother in holding that Ex. VII cannot be taken to be an order negating the claimant's right. But for this view, it would be necessary to consider the further question whether the order Ex. VII (Supposing it is an order negating the right put forward by the claimant) has not to be set aside within a year, the attachment against which the claim was made, having terminated (See Ex. I) and the decree-holder, having made a fresh attachment followed by a fresh claim-petition and a fresh order (Ex. A) allowing the claim. On this point, I am inclined to agree with the decisions in *Ponaka Balaram Reddt v. Hazi Mahomed Abdul* ¹ followed by *Gollampalli Subbayya v. Sankara Venkataratnam* ² and with the decision in *Umesh Chunder Roy v. Raj Bullubh Sen* ³ and *Ibrahimhai v. Kabulabhai* ⁴ and *Kamini Kant Roy v. Ram Nath Chucker butty* ⁵ cited therein, I do not think that the decision in *Ramasamy Chetty v. Alagiri Chetty* ⁶ supports the conclusion drawn in *Singaram Chetty v. Chinnabhi* ⁷ from the decision in which I respectfully dissent. The conclusiveness of the order on claim petitions provided for by O. 21, R. 63 is really a subordinate branch of the rule of *res judicata* and should be limited not only to the parties to the order but also to the claims put forward and to other rights worked out in pursuit of those claims. To hold otherwise is really to say that a decree or order involving a decision is re adjudication between the parties even as to the titles not litigated in the proceedings a conclusion opposed to the fundamental principles of the doctrine of *res judicata* and to create a species of an order *in rem*. If notice was issued to defendants 1 and 2 in the claim proceedings in *Singaram Chetty v. Chinnabhi* ⁷, I would hold that the case was correctly decided.

In the result, I agree with the order of my learned brother.
A. S. V.

Second appeal dismissed.

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Chettiar.
—
Ramesam, J.

1 (1914) 26 M. L. J. 499.

2. (1917) M. W. N. 851.

3 (1882) I. L. R. 8 Cal. 279.

4. (1888) I. L. R. 13 Bom. 72.

5. I. L. R. 21 C. 255.

6. (1915) 27 I. C. 800.

7. (1920) 40 M. L. J. 7.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE ODGERS.

Kaithal Kuttiyali

... Appellant *

v.

Kuzhatte Puthenveetill Thirumangalath

Kashaartan Ummam Amma and etc.

... Respondents.

Kaithal
Kuttiyali.v.
Ummam
Amma.*Malabar Law—Stanomdar—Lease by—Lease for term exceeding his life time—Validity—Lease—Construction—Covenant for renewal—What amounts to.*

Where a Taraga (lease) granted by a Stanomdar ran as follows :—" I shall well improve this paramba and plant, etc; when the improvements have survived the period of decay and the cocoanut trees begin to bear their first fruits, I shall take a Taraga after fixing the rent in accordance with the local custom on an inspection of the kuzhikonoms;" held that the parties intended that if the tenant made any improvement and those improvements were effective, he would be entitled to a lease for another term of 12 years from the date of the expiry of the prior lease and that the rent was to be revised in view of any larger yield from the land that might accrue and also having regard to the custom of the country with respect to such a lease.

A Stanomdar is entitled to grant a lease for a term exceeding his own lifetime so as to make it binding on his successors' provided the lease is such as is beneficial to the estate.

Second Appeal against the decree of the court of the Temporary Subordinate Judge of Tellicheri in Appeal suits Nos. 416 and 417 of 1908 respectively preferred against the decrees of the court of the additional District Munsiff at Tellichery in Original suits No. 16 and 61 of 1915 (O. S. No. 383 of 1914 and O. S. No. 24 of 1915 Principal District Munsiff's Court, Tellichery.)

K. P. M. Menon for appellant.

C. Madhavar Nair and V. P. Karunakaran Nambiar for Respondents.

The Court delivered the following.

Judgment :—The main question in these appeals depends on the construction of Ex. A. which is a lease or rather counter part of a lease known in Malabar as *Taraga*, the purpose of which admittedly was to enable the tenant or the lessee to reclaim the demised land and make improvements thereon. The words of this lease which was granted by the Stanomdar are these :—" I shall well improve this paramba and plant &c, when the improvements have survived the period of decay and the cocoanut trees begin to bear their first fruits, I shall take

a Taraga after fixing the rent in accordance with the local custom on an inspection of the Kuzhikanoms." The Subordinate Judge has held that this clause merely gives an option to the landlord to renew the lease if he so chooses.

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Kuttyali.
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Ummam
Amma.

The appellant on the other hand contends that it is a binding covenant for renewal for another term of 12 years beginning from the expiry of the term of 12 years granted, that is 9th May 1902, the date of Ex A. These words are almost identical with the words in another Taraga lease granted to the tenant by the same Stanomdar or his predecessor-in-title in an unreported case S. A. No. 1423 of 1901. There Mr. Justice Benson who had much experience of Malabar Law and Mr. Justice Bashyam Iyengar held that having regard to the well-known tenures and customs of Malabar, the intention of the parties in executing the deed was to agree that the tenant should hold the land for the usual term of 12 years at the rent fixed in the document and should plant up the land during that time in a husband like manner, that at the end of that term the rent should be enhanced with reference to the improved state of the land and according to the custom of the country in fixing the rent of such improved land, and that the tenant should pay that rent for a further term of 12 years from the expiry of the first term and execute a document binding himself to do so. They granted a decree to the effect that the tenant was entitled to renew the lease which should bear the date, the day of the decree and run for the unexpired portion of 12 years from the expiry of the former lease but without a covenant for further renewal. Having heard Mr. Madhavan Nair fully for the respondent, we are inclined to hold that the words quoted above mean that the parties intended that if the tenant made any improvement and those improvements were effective, he would be entitled to a lease for another term of 12 years from the date of the expiry of the prior lease, and the rent was to be revised in view of any larger yield from the land that may accrue and also having regard to the custom of the country with respect to such a lease. We have been pressed however by Mr. Madhavan Nair with the decision in *Gopalan Nair v. Kunhan Menon* ¹. But that was a case of a Kanom which is not a lease pure and simple but partakes also of a mortgage, and further, the learned Judges one of whom was Mr. Justice Benson

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proceeded upon the fact that the terms of the renewed lease were not set out in the document. Here the rent although not fixed is capable of being ascertained with reference to the nature and value of the improvements and the local custom. We are therefore of opinion that the appellant is entitled to a renewal for a further term of 12 years.

It was argued by Mr. Madhavan Nair that the Stanomdhar who granted the prior lease, the counter part of Ex. A, had no power to bind his successor that is to say, the lease would be operative only during his life time, and that this stipulation for renewal does not bind the successor in office. He contended this as an absolute proposition of law while the very authorities to which he has referred us as set out in Moore's Malabar Law show that the Stanomdhar is entitled to grant a lease for a term exceeding his own life time, so as to make it binding on his successor provided the lease is such as is beneficial to the estate. At p. 349 in his Malabar Law, Moore cites a dictum of Mr. Holloway who was at the time Subordinate Judge of Calicut to the effect that the proof that the alienation of sthanom property is for some purposes tending to the conservation or improvement of the property for those who are to succeed must be clear in order to make such alienation binding. At page 351 a passage from the Judgment of Innes and Muthusamy Iyer, JJ. runs thus :—" But he " (sthanamdar or rather sthanamholder "is also manager of the family for the time being ; if he grants a lease or makes an alienation to enure beyond his life time which is for the benefit of the family, it will be upheld as, on the other hand, any such transaction, if prejudicial to the family, will be set aside, ". Similarly at page 352 it is laid down in another Judgment of this Court. " It is certainly open to a sthani to make a lease of forest land for a term of years, and the mere fact that the alienation is intended to hold good after his life time will not invalidate it. " Here in the written statement, paragraph 5, in O. S. No. 24 of 1915, a plea was taken that the lease was binding only on the stanom holder who granted it and not on the succeeding stanom-holders : There is a general issue, No. 1, to this effect " whether the provision in the marupat to grant a renewal is binding on the 1st defendant. This issue cannot be said to be very happily worded. But it is capable of meaning that if the lease was beneficial to the family it would be binding on the

first defendant in O. S. No. 24 of 1915 who is the present stanom holder. That question however has not been tried by either of the lower Courts; and we think it is necessary in the view we take of the lease, Ex. A. that this issue should be tried before the two suits could be disposed of, if it be found that the lease is binding on the present stanom-holder having regard to the provisions of law already set out, that the appellant, plaintiff in suit No. 61, of 1915, will be entitled to a decree for specific performance in the terms mentioned above, that is to a renewed lease for 12 years dating from the expiry of the lease of May, 1902, without any covenant for a further renewal. The rent will have to be ascertained in accordance with the provision of Ex. A. If the plaintiff in O. S. No. 61 of 1915, succeeded ultimately in obtaining a decree for specific performance, the suit O. S. No. 16, of 1915, will have to be dismissed with costs and his own suit 61 of 1915, will be decreed in his favour.

These Second Appeals therefore are allowed and the judgments of the lower Court reversed and the suits remanded to the court of first instance for disposal in the light of the above observations. The appellant will have his costs from the respondents. Only one Vakil's fee in both cases.

A. S. V.

Second Appeals allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE OLDFIELD AND MR. JUSTICE RAMESAM.

Tarabchand

... *Plaintiff* (Petitioner).*

v.

The Madras and Southern Mahratta

Railway Company, Limited. ... *Defendant (Respondent).*

Limitation Act—Arts. 62, 30, 31—Indian Railways Act, 1890—S. 56—Sale of goods under—Surplus proceeds of—Suit by consignor for recovery of—Limitation.

Held that, a suit by the consignor of goods not delivered to the consignee and sold by the Railway company in the exercise of their right under S. 56 of the Indian Railways Act for the recovery of the surplus proceeds of that sale was governed by art 62, and not by art 30 or 31, of the Limitation Act.

A suit for the surplus sale proceeds is entirely distinct from one for compensation for the non-delivery of the goods, and the fact that the latter class of suit might have been available for the plaintiff is no reason why a suit brought for the recovery of the surplus sale proceeds should not be held to be governed by art. 62.

* Referred Case No. 18 of 1920.

15th March, 1921.

Kaithal
Kuttiyali.
v.
Ummam
Ammu.

Tarabchand
v.
Madras and
Southern
Mahratta
Ry. Co Ltd..

Tarabchand
v.
Madras and
Southern
Maharatta
Ry. Co. Ltd.,

Case stated under S. 69 of the Presidency Small Causes Courts Act by the Presidency Small Cause Court in Suit No. 3721 of 1920. (F. B. No. 118/ 20)

P. Venkataramana Rao, for Petitioner.

R. N. Aiyangar instructed by Brightwell and Moresby, for the Respondent.

The Court delivered the following

Judgment:—The plaintiff in the reference is the consignor of goods by the Madras Railway Company to a consignee at Bangalore. The goods were not delivered and there seems to have been a certain amount of correspondence and inquiry after them by plaintiff. But it came to nothing: apparently because it is common ground that the goods had not on them his correct address and that he stated the station, at which he booked them, incorrectly. It has further been found that in the end the goods, which were in the Railway Company's possession, were sold in the exercise of their right under S. 56 of the Indian Railways Act. The plaintiff is now suing to recover the surplus proceeds of that sale, which in the words of the section, the Railway Company is bound to render to the person entitled.

We are asked to decide what is the article of schedule 1 of the Limitation Act applicable to this suit. The plaintiff contends, and two learned Judges of the Small Cause Court have held, that article is No. 62—"For money payable by the defendant to the plaintiff for money received by the defendant for the Plaintiff's use." On the other hand, as one learned Judge has held, the Railway Company contends for the application either of article 30 or 31, the two articles dealing with suits against a carrier. Article 30 may at once be dismissed from consideration because there is no question in the present case of loss or injury to goods. We therefore have to decide between Arts. 31 and 62.

It is not disputed that Art. 62 would apply in terms to the sale proceeds. The argument of Mr. R. N. Aiyangar on behalf of the Company is however that plaintiff, having a right of suit for compensation for non delivery of the goods, must be supposed to be now suing to enforce that right and that art. 31 is applicable. Mr. Aiyangar has relied strongly on the fact that S. 56 of the Indian Railways Act, is contained in Chapter VI thereof, dealing with the 'working of

Railways,' whereas the responsibility of Railway Companies is dealt with in Chapter VII, and he has referred to the statement of His Lordship the Chief Justice in *M. and S. M. Ry. Cy., Ltd. v. Haridos Bannali Doss*¹ that Chapter VII must be taken, and was intended to cover the whole liability of the Railway Company including among other things the responsibility of the Railway Company for misdelivery by whatever reason caused. It is sufficient to observe that S. 56 (2) and the procedure authorised therein were not in question in that case and there is no reason for assuming that it was present to the mind of his Lordship or that, if it had been brought to his notice, he would have used the same expressions.

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Ry. Co. Ltd.,

As we read S. 56, it authorises the Railway Company to adopt a certain procedure and to hold a sale and gives a direction as to this disposal of the proceeds thereof. We cannot hold that that direction is merely moral or administrative. There is no reason why it should not confer a right to the surplus proceeds on the person referred to in the section as entitled to them. That person would be in the present case the plaintiff. There is further no reason why that right should not be enforced by a suit. Such a suit could not be brought until after the sale, that is, in the words of the third column of the schedule, until after the date when the money was received for the plaintiff's use. The argument for the application of art. 31 can be supported only on the assumption that what the plaintiff is suing for is not merely the surplus sale proceeds, but compensation for the non delivery of goods; and that is not how the plaintiff has described his claim. This distinction is material for compensation for the non delivery of the goods might very well be, and in fact very frequently would be much more than the surplus sale proceeds. The two classes of suits are entirely distinct and, because the suit to which art. 31 would apply might have been available for the plaintiff, that is no reason why we should refuse to regard his suit as one for the money referred to in S. 56 (2) to which art. 62 would apply.

We hold that the suit is in time and answer the reference accordingly. The costs of this reference will be provided for in the decree.

A. S. V.

1. (1919) I. L. R. 41 Mad. 871 at p. 877. 35 M. L. J. 35.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR JOHN WALLIS KNT. CHIEF JUSTICE AND
MR. JUSTICE OLDFIELD.

Sri Rajah Inuganti Venkata Rajagopala ... *Appellant* * (*Plaintiff*)
Suryarao Bahadur Garu

v.

Sri Rajah Datla Venkata Suryanarayana
Jagapathi Bahadur Garu and another ... *Respondents* (*Defendants 3 and 4.*)

Sri Raja
Suryarao
Rao Bahadur
Garu

v.

Sri Rajah
Surya-
narayana
Jagapathi
Bahadur
garu.

Hindu Law—Widow—Surrender by—Validity—Test—Alienation of whole estate by successive steps—Debts of widow—Undertaking by reversioner to discharge—Effect.

What is necessary to bring the doctrine of surrender into effect is that the widow should part with the whole of the interest; it does not matter whether it is done by one single act or by a number of successive acts.

Whether an undertaking by the reversioner to discharge the existing debts of the widow would invalidate the surrender depends upon the circumstances of each case, the test to be applied being to see whether the transaction is a *bona fide* surrender or a mere devise to divide the estate with the reversioner.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Cocanada in Original Suit No. 8 of 1913 (O. S. No. 63 of 1908 on the file of the Sub Court, Cocanada).

S. Srinivasa Aiyangar and P. Narayanamurthi for appellants.

A. Krishnaswami Aiyer, P. Somasundaram and S. Asavanuda Aiyangar for Respondents.

The Court delivered the following

Wallis, C. J.

Judgment :—*The Chief Justice* :—This is an appeal from the judgment of the Subordinate Judge of Cocanada in a suit brought by the plaintiff as the next reversioner of the last male owner Surya Rao to recover the suit properties which formed part of the estate of the last male owner.

The position is somewhat a curious one because these properties were purchased by the defendants in a court auction under decrees obtained against the plaintiff himself. The last male owner left a mother and two sisters and the present plaintiff is the grandson of the elder sister. The mother in 1870 transferred a third of the estate she inherited from her son to each of her two daughters reserving a third for herself.

Then at a later stage after the death of her two daughters the widow executed another deed, Ex. I, by which she surrendered the one-third that she had previously reserved

* Appeal No. 22 of 1917.

16th February, 1921.

for herself to her two grandsons, each being the son of one daughter, in equal shares. This was in 1890. The widow survived till 1907. In the meantime the whole estate of the last maleowner was inherited by the two grandsons of whom the plaintiff's father was one. The plaintiff's father incurred debts and it was in respect of these debts that decrees were obtained and the suit properties were brought to sale and purchased by the defendants. Now that plaintiff, on the death of the widow, has succeeded as next reversioner to the share of the last male owner, he seeks to invalidate these Court sales on the ground that they were made pursuant to alienations by the mother of the last male owner for purposes which were not binding and that they are not binding upon him.

Now the decision of this question depends on the question whether the widow made an effective surrender of her estate to the plaintiff's father and his cousin who were the next reversioners in 1890, when she parted with her remaining third. At that time, these two, the plaintiff and his cousin, were in possession of all the estate of the last male owner except this one-third. After the surrender of this one-third they were in possession of the whole of the last male owner's estate and the widow retained no further interest in it. The widow had entirely effaced herself and her rights in favour of the next reversioner.

Now it has been suggested that this surrender was bad because there were two distinct surrenders, each of a part of the inheritance. What was necessary to bring this doctrine of surrender into effect was that the widow should part with the whole of the interest; it does not matter whether it was done by one single act or by a number of successive acts. In *Nachiyappa Goundan's case* ¹ the Privy Council suggested that the defects of the earlier decision in *Bajrangji Singh v. Manokarnika Baksh Singh* ² might be explained on the ground that these alienations *in cumulo* amounted to an alienation of the whole of the immoveable property. That is very much what has happened here. There has been an alienation of the whole estate by successive steps.

Objection is taken to the last surrender because it provides that the estate is to continue to be registered in her name but the whole beneficial interest was in her grandsons and we think that there is no substance in this objection.

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Rao Bahadur
Garu
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Sri Rajah
Surya-
narayana
Jagapathi
Bahadur
Garu
—
Wallis, C. J.

1. (1919) I. L. R. 42 Mad. 523.36 M. L. J. 439, - 2. I. L. R. 30 All. 1.

Sri Raja
Suryarao
Rao Bahadur
Garu
v.
Sri Rajah
Surya-
narayana
Jagapathi
Bahadur
Garu.

Wallis, C. J.

An objection has also been taken to the validity of the surrender, because in Ex. I, the plaintiff and his cousin undertook to discharge the debts set out in Ex. I to the extent of about one lakh and fifty thousand rupees. Now the evidence is that this estate had been involved in three expensive litigations, in the first of which the title of the last male owner was challenged. The first of these litigations dates so far back as 1870 and it seems very probable to say the least, that the bulk of this indebtedness was incurred in connection with these litigations; but however this might be, there can be no doubt that those debts existed, and I think also that the creditors would have claimed that they were binding upon the estate. But, even if they were not, the question arises whether an undertaking by the reversioner to discharge the existing debts of the widow would invalidate an arrangement of this kind. Each case must be judged on its own circumstances and the test we have to apply has been laid down by the Privy Council in three recent cases beginning with *Rangaswami Gounden v. Nachiyappa Gounden* ¹, *Chondhury Sureshwar Misser v. Mussamut Maheshwari Misra* ², and *Bhagwat Koer v. Dhanukdhari Prasad Singh* ³. In *Rangaswami Gounden v. Nachiyappa Gounden* ¹, their Lordships say that "an alienation by a widow of her deceased husband's estate held by her may be validated if it can be shown to be a surrender of her whole interest in the whole estate in favour of the nearest reversioner or reversioners at the time of the alienation. In such circumstances the question of necessity does not fall to be considered. But the surrender must be a *bona fide* surrender, not a device to divide the estate with the reversioner. The same test has been repeated in the later case and at present all that we have to see about the recent absolute surrender is whether it was a *bona fide* surrender or a mere device to divide the estate with the reversioner. Now applying that test in the present case, I can see no reason whatever for holding that this final surrender by the widow in 1890 was not a *bona fide* surrender or was in any sense a device for the purpose of dividing the estate with the reversioner.

Some argument has been addressed to us as to whether the alienations made by a widow for the purposes which are not

1 (1918) 1 L. R. 42 Mad 523 2 (1919) 39 M. L. J. 161.

3 (1919) 1 L. R. 47 Cal 406. 37 M. L. J. 513.

binding on the estate are affected by such surrender. It has been held in *Subbamma v. Subramaniam* ¹, that they are not, whereas a contrary opinion has been expressed in an unreported case, C. M. A. No. 322 of 1919. Speaking for myself, I see no reason to depart from the ruling in *Subbamma v. Subramaniam* ¹, but it is unnecessary to express any final opinion on the question.

The appeal fails and is dismissed with costs.

Oldfield, J. :—As regards C. M. A. No. 322 of 1919, it does not seem to me to be necessary to attempt to define the extent to which after the argument just concluded I should adhere to the decision if the same point were again before me. For the present case it is sufficient that there is nothing in the widow's conduct which has in any respect prejudiced the ultimate reversioner in any way irreconcilable with the widow's undoubted right to make a surrender in favour of the person who is reversioner at some earlier date to the prejudice of the person who would otherwise be entitled to the estate on her death. The doctrine of surrender appears to rest upon no text and it may therefore, as I understand it, be given effect to in any way consistently with the principle on which it is based, that principle being that the widow's effacement of herself at once opens the succession in favour of the reversioner on the date of such effacement. In such a case as the present, when the remainder of the widow's estate has already reached his hands there can be no unfair prejudice to anyone, if we regard the surrender to him as covering not merely the estate particularly conveyed but also the whole estate over which the widow had control, the remainder of which is already in his possession.

A. S. V.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE SADASIVA IYER.

Ramalingam Pillai

... *Appellant* (Petitioner.)*

v.

The Official Receiver.

Trichinopoly and another ... *(Respondent.)*

Provincial Insolvency Act—S. 22—District Court—Jurisdiction—Purchaser at sale by official Receiver—Application for his bid being accepted and for declaring sale to another to be invalid—Maintainability—Regular suit—Necessity.

A. A. O. No. 83 of 1920.

28th October, 1920.

1. (1915) 1 L. R. 39 Mad 1035.

Sri Raja
Suryarao
Rao Bahadur
Garu
v.
Sri Rajah
Surya-
narayana
Jagapathi
Bahadur
Garu.

Oldfield, J.

Ramalingam
Pillai
v.
Official
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Ramalingam
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Official
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Under S. 22 of the Provincial Insolvency Act the District Court has jurisdiction to deal with an application by the purchaser of the property of an insolvent at a sale held by the Official Receiver to the effect that his bid might be accepted and that the sale to another person be held to be invalid. A regular suit by such purchaser for the purpose is not necessary.

Appeal against the order dated the 9th, day of December 1919, and made in C. M. P. No. 624, of 1919, in I. P. No. 20 of 1917 on the file of the District Court, Trichinopoly.

T. S. Visvanatha Aiyar for appellant.

S. T. Srinivasa Gopalachari for respondent.

The Court delivered the following

Judgment :—In this case an application was made by the appellant, who purports to have purchased the property of an insolvent at a sale held by the official Receiver, to the effect that his bid might be accepted and that the sale to another person be held to be invalid. The learned District Judge is of opinion that he has no jurisdiction to deal with the matter under S. 22 of the Provincial Insolvency Act and that a regular suit is necessary. This view of the law is opposed to the very wide language of S. 22, which says that "if the insolvent or any of the creditors or any other person is aggrieved by any act or decision of the receiver, he may apply to the court, and the court may confirm, reverse or modify the act or decision complained of and make such order as it thinks just". It seems to us that it is convenient and proper that matters of this sort should be disposed of by the executing Court and that is the plain direction of the legislature as contained in S. 22. This is the view taken in two recent decisions of this court in *Thiruvengkatacharia v. Thangayiammal* ¹ and *Avanasi Chetty v. Muthukaruppa Chetty* ². Therefore we set aside the order of the District Judge and remit the matter to him for disposal according to law. Costs will abide the result.

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Order set aside.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR JOHN WALLIS, CHIEF JUSTICE AND MR. JUSTICE. KRISHNAN.

Rajah V. Muthu Krishna

Yachendra Bahadur

... Appellant * (Defendant).

v.

W. H. Nurse

... Respondent (1st Plaintiff).

Original side Rules (Madras)—Rule 48—Written Statement—Extension of time for filing—Sufficient cause—Improper refusal of vakil himself to file a statement in time or to allow another to do so—Vakil—Non-payment of stipulated fees—Remedy in case of—Refusal to act in cause or to allow another to act—Propriety.

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Vakils, who are allowed to act as well as plead on the Original Side of the High Court, are, as regards acting, very much in the same position as solicitors in England. Attorneys or solicitors are not entitled to refuse to go on with an action for want of funds unless they have given their clients sufficient notice of their intention to enable him to make other arrangements. *Held*, therefore that a vakil was not entitled to refuse to take a necessary step in a case, because his own fees had not been paid, and at the same time refuse his consent to the transfer of the case to another vakil.

Where, owing to the unjustifiable conduct of a vakil for the defendant in a suit in refusing himself to file a written statement on his behalf in time or to allow another vakil to do so, the defendant applied for an extension of time for filing the statement, *held further*, reversing the decision of the trial Judge, that the case was one in which the delay should be excused.

On appeal from the order of the Honourable Mr. Justice Phillips dated 23rd November 1920 in T. O. S. No. 19 of 1920 on the file of the High Court, passed in the exercise of its Ordinary Original Testamentary Jurisdiction.

The Advocate General (C. P. Ramaswami Aiyar) K. Rajah Aiyar, K. Krishnaswami Aiyangar and T. Kumaraswamiah for appellant.

R. N. Aiyangar instructed by King and Patridge.

The Court delivered the following

Judgments :—*The Chief Justice* :—This is an appeal from an order of Phillips, J. refusing leave to file a written statement which was out of time, and raises a question of considerable importance. The cause of the delay was that the defendant's vakils refused either to file the written statement themselves or to consent to another vakil being brought on the record unless they were paid Rs. 1000 towards the costs of the suit which they alleged the defendant had agreed to pay at this stage of the case. In these circumstances the defendant was precluded by the Original Side Rules from filing the written statement

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himself or getting another vakil to file it. I take the facts from the vakil's own counter-affidavit in answer to the application for a change of vakil. The change was eventually ordered by consent upon the defendant's paying the vakils Rs. 500, but the written statement was then out of time, and, as I have already said, the learned Judge has refused to excuse the delay. Now I may say at once that I have come to the conclusion upon a consideration of authorities which were not cited to the learned Judge that the defendant's vakils were not justified in refusing themselves to file the written statement in time or to allow another vakil to do so and that the defendant ought not to be prejudiced by their conduct. In this Court vakils are allowed to act as well as plead on the original side, and as regards acting are very much in the same position as solicitors in England. Now it is I think well settled in England that attorneys or solicitors are not entitled to refuse to go on with an action for want of funds unless they have given their clients sufficient notice of their intention to enable him to make other arrangements. The rule is laid down even without this limitation in "*Observations addressed by Lord Westbury on behalf of the Privy Council to a solicitor of the Court*"¹ with reference to an Indian Appeal. "It is the duty," said Lord "Westbury" of a solicitor, who has once undertaken to conduct a cause to carry it to a conclusion, and he cannot refuse to do that duty by reason of the client not having complied with any application that may have been made to him." This was the old common law rule as stated in Tidd's Practice, 9th edition p. 86, but it had also been held by Lord Tenderden in *Rowson v. Earle*² and by Tindal, C. J. in *Lawrence v. Potts*³ and in *Van Sandasi v. Browne*⁴ that an attorney was entitled to refuse to go on unless he were put in funds provided that he gave his client sufficient notice of his intention not to go on. The question was again considered in *Underwood Son and Piper v. Lewis*⁵ in which Lord Esher laid down that a solicitor accepting a retainer was bound to go on in the absence of good cause such as a refusal by the client to find the money for necessary disbursements which terms did not include his own costs. These cases are entirely opposed to the view that a vakil is entitled to refuse to take a necessary step

1. (1870) 4 Ben L. R. 29.

2. 1 M. and M. 538.

3. 6 C & P 428.

4. 9 Bing 402.

5. (1894) 2 Q. B. 306.

in the case, because his own fees have not been paid, and at the same time refuse his consent to the transfer of the case to another vakil. It is true that on the common law side an attorney could resist a change of attorneys unless his costs were paid, by which must be understood his costs for work already done in the action, not as in the present case an agreed payment towards the general costs of the action. On the equity side, a change of solicitors was allowed without insisting on the payment of costs, and this equitable rule has been held to prevail by reason of the provisions of the Judicature Act, and is now embodied in O. 7, R. 3 of the Supreme Court Rules; but even the common law rule must be read in the light of the other rule already mentioned that it is the solicitor's duty to go on if put in funds to meet out of pocket expenses. I may further observe that the rules requiring pleadings to be filed promptly were passed to avoid delays in the disposal of the business of the Court and not as a means of enabling practitioners to obtain prompt payment of their fees, and that no previous instance of their being used for this purpose appears to have come before the Courts either in England or in India. It is also unnecessary and undesirable that they should be used for such a purpose as solicitors and vakils are otherwise sufficiently protected. They can insist on payment of their fees in advance or rely on their lien on the client's papers and on the fruits of the litigation as well as on their right to sue for their fees. They are also in a better position than Barristers, who cannot sue at all and then 1st and 2nd grade pleaders who under the Legal practitioners' Act cannot recover on special agreements unless they are in writing and filed in Court and then only to the extent to which they are reasonable. It has also been urged before us that we should not interfere because the defence is a frivolous one. That however is a question to be decided at the trial. We must allow the appeal and give leave to file the written statement with costs of this appeal.

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Wallis, C. J.

. *Krishnan, J.* :— This appeal arises from certain probate proceedings on the original side of this court. The respondent applied for the probate of an alleged will of the late Rajah Venugopal Bahadur. On citations being issued the appellant the Rajah's brother filed a caveat and the matter was then ordered to be tried as a suit under S. 83 of the Probate and Administration Act with the respondent as plaintiff.

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and the appellant as defendant. The appeal is against the order of the trial Judge refusing to grant extension of time to the defendant for filing his written statement in the suit.

The circumstances that led to the application for extension are as follows :—The last day under the rules for filing the written statement in the case was the 1st of November. It would appear from the defendant's vakil's affidavit that the defendant had agreed to pay a vakil's fee of Rs. 1,000 for the suit before filing the written statement. By the 1st of November only a portion of the money had been paid and though the vakils had prepared a written statement they refused to file it without their balance fee being paid. The appellant had some difficulty in finding the money at such short notice and he therefore went and engaged another vakil and got him to file a written statement in time hoping thereby to save his defence.

Unfortunately for him under the rules of practice on the Original Side that written statement could not be accepted as properly filed without an order of Court for a change of vakils and the written statement was therefore returned and the case placed on the undefended board. His vakils on record refused to give their consent to any addition or change of vakils without their fee being paid in full and by their conduct they effectively prevented defendant from prosecuting his defence. An application was thereupon made for a change of vakils and the learned trial Judge allowed it on condition that the appellant should pay Rs. 500 to his former vakils and the money was paid. This was on the 22nd of November. The case came on for hearing on the 23rd though the defendant's written statement had been actually filed on the 1st of November it could not be treated under the rules as properly filed till the order for change of vakils was obtained and was thus out of time. The defendant therefore applied for extension of time to cure the defect under R. 48 of the rules of practice. It was that application that was refused by the learned Judge with the result that the order for change of vakils granted by him the previous day was rendered altogether useless.

Now it seems to me that the delay in filing the written statement was due more to the mistaken action of the defendant's vakils in refusing to file it without being paid their fee in full than to any wilful default on the defendant's part. I agree

with the learned Chief Justice that the action of the vakils was not justifiable and that the rules were not intended for the purpose of enabling vakils to force their clients to pay their fees at the risk of having their cases dismissed by the Court otherwise. The learned Chief Justice has dealt with this point fully and referred to all the authorities on it, and as I agree with him I do not propose to dilate on it. When therefore the vakils refused to file the written statement on the last date for it, I think the defendant was justified in seeking the help of another vakil to file it and the subsequent delay which was solely due to his having to obtain the order of Court for a change of vakils to enable his new vakil to act for him should not be used to his prejudice. The Court having subsequently actually ordered the change it seems to me that the delay should not be pressed against him, at any rate, so stringently as to lead to his defence not being heard.

Further more, there is the fact that this is a testamentary suit the judgment in which will be binding not only on the parties but on all the world as a judgment *in rem* under S. 41 of the Evidence Act. In such a case it seems to me the Court ought to be slow in refusing to hear the defence as it might prejudice not merely the defaulting defendant but others as well.

These important considerations were not brought to the notice of the trial judge when he refused the extension applied for. Though in matters of discretion we should be slow to interfere with the order of the trial Judge it seems to me that this is a case where we are justified in interfering.

I therefore agree to the order proposed by the learned Chief Justice.

Appeal allowed.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE NAPIER AND MR. JUSTICE ODGERS.

Subbarama Aiyar

... *Appellant* (Deft.)*

v.

A. P. T. Veerabadra Pillai

... *Respondent (Plff.)*

Limitation Act—S. 19—Acknowledgment—Validity—Essentials—English and Indian Laws—Distinction—Acknowledgment of subsisting liability—What amounts to.

Where, in a suit on a promissory note, it appeared that the maker had, in the course of his examination as a witness in certain criminal proceedings, made a

* S. A. No. 1027 of 1920.

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statement with reference to the note to the effect:—"I executed the promissory note. The contents of the promissory note are correct", and that, at the date that the note was shown to the witness, there were four endorsements of various payments, held that the statement amounted to an acknowledgment of liability subsisting at the date thereof within the meaning of S. 19 of the Limitation Act.

Observations on the distinction between the English and the Indian Law on the subject and on the effect of the decision in 33 C. 1047 P. C.

Second appeal against the decree of the court of the Subordinate Judge of Trichinopoly in A. S. No. 113 of 1919 (A. S. No. 345 of 1918 on the file of the District Court) preferred against the decree of the court of the Additional District Munsif of Kulitalai in O. S. No. 164 of 1917 (O. S. No. 733 of 1917 on the file of the Principle District Munsif's Court of Kulitalai.)

M. S. Vaidhinatha Aiyar for appellant.

T. R. Ramachandra Aiyar and *T. R. Krishnaswami Aiyar* for the respondent.

The Court delivered the following

Napier, J.

Judgments:—*Napier, J.*:—In the suit from which this Second Appeal lies, the question arose as to the effect of a statement made by a witness in certain criminal proceedings, whether that statement amounted to an acknowledgment of liability within S. 19 of the Limitation Act. The statement is as follows:—"I executed the promissory-note Ex. R (suit promissory-note). The contents of the promissory-note are correct." Ex. R (which is Ex. A in the present case) is a promissory-note acknowledging liability for Rs. 1,322-11-11 with a promise to pay with interest at 12 per cent. per annum. On that promissory-note there were, at the date that the document was shown to the witness, four endorsements of various payments in 1912. The statement made by the witness is, admittedly, within the period of limitation which has to be applied in this case. The question is whether this amounts to an acknowledgement.

Both the appellant and the respondent have relied on the decision of the Privy Council in *Muniram Seth v. Seth Rupchand*¹, the vakil for the appellant contending that their Lordships of the Privy Council have laid down that the whole of the recognised English law on this subject applies in India. The passage from which he seeks to draw this inference is as follows:—"The Indian Limitation Act, S. 19, however, says

1, I, L. R. 33 Cal. 1047. (P. C.)

nothing about a promise to pay and requires only a definite admission of liability, as to which there can be no reason for departing from the English principle that an unqualified admission and an admission qualified by a condition, which is fulfilled stand upon precisely the same footing." Bearing in mind that their Lordships begin the sentence by saying that "The Indian Limitation Act says nothing about a promise to pay," it seems to me necessarily to follow that the reasoning of Courts in England based on the theory underlying the effect given to an acknowledgment, namely, that they indicate a promise to pay has very little application to cases under the Indian Act. Their Lordships also point out that the requirements of English Law are, if anything, more stringent than those of Indian Law. This is, of course, due to the fact that Lord Tenterden's Act (9, Geo. IV C. 14,) of 1828, S. 1 assumes that the legal effect of the writing is that it evidences a new or continuing contract. It was the necessity of finding this new and continuing contract which induced English courts to give such a liberal interpretation to ordinary acknowledgments and read into them a promise to pay on the basis that honest men always intend to pay something the liability to which they acknowledge, but under the Indian Law, as pointed out by their Lordships, there is no necessity to show anything from which a promise to pay could be inferred and, therefore, any decisions of the Courts of India which consider these acknowledgments on the basis that they must be such from which a promise to pay can be inferred are no longer good law.

The same case was relied on for the respondent because of the particular matter dealt with and the language applied to the matter by their Lordships. The acknowledgment in the case before their Lordships was as follows; it was in probate proceedings: "That the applicant Rupchand Nanabhai is a big Mahajan of Burhampur paying Rs. 106 as income-tax. For the last five years he had opened current accounts with the deceased." Their Lordships say that the words "for the last five years" must necessarily have reference to the five years prior to the death of the testator which was in October 1898 and it appears that the petition in which the words are found was put in on the 28th of September 1889 very nearly a year later. Assuming, as their Lordships do, that the admission is of the condition of affairs up to the date of the testator's death,

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their Lordships say this : " The legal consequence would be that at that date either of them had a right as against the other to an account." And at page 1059 their Lordships say, "If nothing further is alleged, the natural presumption is that they continued unsettled at the time the statement was made." If such an inference that accounts remained unsettled for a year after the period to which the acknowledgments refer can be made, it seems to me that where the statement is as to one transaction like the existence of a liability on a promissory note, the inference must necessarily be much stronger because admittedly, where there are open accounts, the fact of the liability which is the basis of the whole effect of the section can only be ascertained when the accounts have been taken, whereas there is no question of accounts where the amount admitted to be due is on a promissory note and there is no suggestion of any credit on any other account. Miller, J. of this court had to consider this case in *Ranganayakalu Aiyar v. Subbayyan* ¹ and said as follows quoting the passage at page 1059 : "That is to say or so it seems to me an acknowledgment of liability existing at a past date without any allegation that the liability has since ceased, is presumed to be an acknowledgment of liability when the statement is made." If that is the correct deduction from the language used by the Privy Council, then that is amply sufficient to cover this case, and, speaking for myself, I cannot see why we should not draw the same deduction from that language. It may not necessarily always be that deduction to be drawn ; but considering that the admission is one of the execution of a promissory note without any allegation that it has been discharged, I fail to see why a court cannot draw from such a statement the inference that the liability on the promissory note is still subsisting, still more so where as in the case before us for consideration the document, the contents of which are admitted by the deponent to be correct, shows payments endorsed of an amount which is not nearly sufficient to cover the principal and the interest which would have accrued at the date when the statement was made.

I do not think it necessary to examine the cases at any length. We were pressed with a decision of this court in *Periavenkan Udaya Tevar v. Subramanian Chetty*, ² but the language there is, "This amount of Rs. 600 and odd also I was

1. 5 M L T. 71,

2. I. L. R. 20 Mad. 239.

bound to pay under the original understanding, but the plaintiff paid it, as a warrant was brought for his arrest."

The only inference to be drawn from such a language would be that there was a joint liability originally which had been discharged by payment to the plaintiff, and that therefore, no further liability remained. As the learned Judges say, "These words admit that a liability existed at the time of the original understanding, that is some three years before the acknowledgment was made, but they do not admit any liability as existing at the time that statement was made." It seems to me that the words go further than that and that not only do they not admit but that they specifically and directly negative the existence of such liability.

In the result, I would hold that the acknowledgment here is a good acknowledgment and that, therefore, the period of limitation is saved. The Second Appeal is dismissed with costs.

Odgers, J. :—The facts of the case are fully set out in the judgment of my learned brother. In my opinion, we have not to look to the Privy Council decision in *Maniram Seth v. Seth Rupchand*¹ to find the requisites of an acknowledgment, within S. 19 of the Limitation Act. We have been referred to several decisions prior to the one of the Privy Council and to one English decision in *Green v. Humphreys*² to the effect that the inference to be drawn from the words relied on as acknowledgment must be that the debtor intends to pay the debt. *Venkata v. Parthasarathi*³ decided that the acknowledgment must be of the debt as such qua debt and the relation of debtor and creditor must be admitted and admitted to be a subsisting jural relation. To the same effect is the decision in *Ittappan Kuthiravattat Nayar v. Nanu Sastri*⁴ namely, that the acknowledgment must import that the person making it is then under an existing liability and *Benode Behary Mookerjee v. Raj Narain Mitter*⁵ viz, that an unequivocal admission of the debt or of the subsisting relationship of debtor and creditor must be established.

It was contended before us that there is in effect no distinction between the Indian and the English Law in the case of limitation. But the case in the Privy Council is only in my

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1. I. L. R. 33 Cal. 1047.

2. 26 Ch. Dn. 474.

3. I. L. R. 16 Mad. 220.

4. I. L. R. 26 Mad. 34.

5. I. L. R. 30 Cal. 899.

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opinion authority for saying, that there is no reason for drawing any distinction between the English and the Indian Law in respect of the acknowledgment of liability. Their Lordships set out the three essentials laid down in *In re River Steamer Company v. Mitchell's claim*¹ and they notice that in all the three essentials there must be a promise of some kind or another to pay the debt. Their Lordships point out that "S. 19 of the Indian Limitation Act says nothing about a promise to pay and requires only a definite admission of liability, as to which there can be no reason for departing from the English principle that an unqualified admission and an admission qualified by a condition, which is fulfilled, stand upon precisely the same footing." It is therefore clear as pointed out by my learned brother that the English cases proceeding upon three essentials as laid down by Mellish, L. J., in the case above quoted can hardly furnish a certain guide in considering cases under the Limitation Act under only an admission of liability is required. To refer once more to the Privy Council case, their Lordships say that as to the acknowledgment under their consideration. "The first sentence shows that there were open accounts at the death of moteram. If nothing further is alleged, the natural presumption is that they contained unsettled at the time the statement was made.

Now, it has been contended before us that the acknowledgment that we have to consider—the words of which have been set out in my learned brother's judgment—amounts to nothing but a reference to a past transaction. I am unable to accept this contention. The reference to the execution of the bond is undoubtedly in the past tense, but the admission that the contents of the bond are correct is in the present tense and there is further the fact that the four endorsements on the back of the promissory note are not only set out but totalled, so that the witness taking the document into his hands could have seen at a glance that the total of the payments endorsed falls below the amount in figures on the face of the promissory note, to say nothing of the question of interest that was outstanding on that date. I should, have referred to the case in *Ranganayakulu Aiyar v. Subbayyan*² in which Miller, J. referring to the Privy Council decision above referred to and adopting that decision, held "That an

1. L. R. 6 Ch. Ap. 822.

2. 5 M. L. T. 71.

acknowledgment of liability existing at a past date without any allegations that the liability has since ceased is presumed to be an acknowledgment of liability existing when the statement is made." It seems to me therefore that when the witness said that the contents of the document were correct at the time he made deposition relied on as an acknowledgment in this case, he must be taken to have admitted that his liability was still outstanding as between the payee of the promissory note and himself.

I agree with the opinion of my learned brother that the state of the promissory note in this case makes even a stronger case for the view that this is an acknowledgment of liability than in the case before Miller, J. For these reasons I agree that the second appeal should be dismissed with costs.

A. S. V. ————— *Second Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
FULL BENCH.

PRESENT :—SIR JOHN WALLIS CHIEF JUSTICE, MR. JUSTICE SPENCER AND MR. JUSTICE KUMARASWAMI SASTRI.

The Secretary of State for India ... *Appellant** (*Defendant*).
in Council represented by the
Collector of North Arcot

v.

Syed Ahmad Badsha Sahib ... *Respondent* (*Plaintiff*).
Bahadur

Civil Procedure Code S. 11—Indian Evidence Act Ss. 41 to 43—Judgments in personam not inter partes—Effect of—Whether operate as a bar of a subsequent suit—Only of evidentiary value in some cases.

It is open to a party to reassert against a third person a title which has been definitely negated in a previous suit against a contesting claimant.

The present plaintiff brought a suit against two persons for a declaration that he was entitled to the office of Asari Sheriff and to recover from the government the emoluments of the office. It was held in that suit that the plaintiff did not prove title to the office and his suit was dismissed. The plff. then brought the present suit against the Government to recover a sum of money alleged to be due to him as the person entitled to the office of Asari sheriff and to perform the services connected therewith. In this suit the government pleaded the judgment in the former suit as a bar to the plff's claim. *Held* by the Full Bench, that the former judgment does not operate as a bar to the trial of the plff's claim as against the Government *Srinivasa Aiyangar v. Srinivasa Aiyangar* 1. and *Ramamurthi Dhora v. Secretary of State for India* 2. overruled, *Peari Mohan Shaha v. Durlavi Dassya* 3. followed.

Former judgments not *inter partes* do operate as a bar to the trial of a suit though they may be received in evidence.

Distinction between judgments *in rem* and judgments *in personam* pointed out.

* S. A. No. 15 of 1920. 13th October, 1920.
1. (1909) 33 M. 483. 2. () 36 Mad. 141. 3. (1914) 18 C. W. N. 954.

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Second Appeal against the decree of the Subordinate Judge of North Arcot in Appeal Suit 1917, preferred against the decree of the Court of Munsif of Ranipet in Original Suit No. 217 of 1911.

The Government Pleader for the appellant.

T. Rangachariar, for the respondent.

The Court (Napier and Krishnan, JJ.) made the
ORDER OF REFERENCE TO A FULL

Napier, J. :—The question which arises in this of estoppel by a previous judgment. This suit was Ahmad against the Secretary of State to recover Rs. 394, alleged to be due to the plaintiff as a pe to possess the Asafi Sheriff and perform the service therewith and to receive from Government the granted by Government to the person so entitled. dant pleaded that the plaintiff was not entitled his claim having been negatived by the judgment Court in S. A. No. 726 of 1913, and also that the s red by the rule of *res judicata*.

The issue framed was "whether the plaintiff's office in question is concluded by reason of the d No. 726 of 1913, on the file of the High Court." that case was by the present plaintiff against two alleging that the plaintiff was entitled to perfo Sheriff services and to recover annually the emol 394 from Government without any objection by th The 2nd defendant was recognised by Govern person entitled to the emoluments. The Cou ordinate Judge of North Arcot on appeal from Munsif in that suit held against the plaintiff's right out that the plaintiff did not claim the office by either by Government or by the last holder of t only according to the Mahomedan Law of success property, and held that that law did not apply and the plaintiff had no title. In the Second Appeal Court the judgment states as follows :—"It be the plaintiff has no title to the office, the declarati which was the principal relief claimed in the s brought for that relief and other subsidiary relie dismissed by the Lower Appellate Court."

Dealing with the second issue in this case the District Munsif held that it was no longer open to him, now to sue to recover the emoluments appertaining to the office he being concluded by reason of the prior judgments. The Lower Appellate Court however held that the decision in the former suit did not operate as *res-judicata*.

It must first be pointed out that no suggestion is made in this suit that the plaintiff's suit was barred under S. 11, Code of Civil Procedure. This contention could not have been raised as the defendants in the prior suit were different. But the Lower Appellate Court is in error in supposing that this disposes of the question. It is contended that the judgment in the prior suit disposed of his claim and that the plaintiff cannot raise this question in another form. This proposition is established in the case of *Srinivasa Aiyangar v. Arayar Srinivasa Aiyangar*,¹ entirely apart from any question of S. 11. The Bench there accepted the proposition that the relation established between the parties by a judgment is conclusive against third persons in the absence of fraud upon them. The prior suit having been between a person put forward by Government and the plaintiff, the decision as to title between them is binding on the defendant in this suit and must therefore be binding on the plaintiff on the well-known principle that estoppels must be mutual assuming always that the case in *Srinivasa Aiyangar v. Arayar Srinivasa Aiyangar*¹ is rightly decided.

The same proposition was laid down in the case of *Ramamurti Dhora v. The Secretary of State for India in Council*². There the Bench adopted the view expressed in an unreported case, Second Appeal No. 574, of 1909, and re-stated the same proposition as was there laid down. On page 144, the learned Judges say "The question does not depend on the application of the doctrine of *res-judicata* between the parties as expounded in S. 13, Code of Civil Procedure (old Code). That section does not cover all cases of estoppel by judgment." On page 143 they say "The question relating to the ownership of the land was one entirely between the plaintiffs and the Barikis; and the Barikis having obtained judgment against the plaintiffs, third parties having no interest in the land at the time of the litigation cannot dispute a settlement of the dispute

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between them as to title, and it appears to us to be equally true that neither of the parties to the litigation can be permitted to aver as against third persons in the like position that the land belongs to himself and not to his opponent in the litigation." This judgment, again, if correct, is conclusive of the plaintiff's claim.

It is suggested that these cases were wrongly decided, and reliance is placed on the judgment of the learned Chief Justice and another learned Judge in S. A. No. 1747 of 1919. The Court there says that the grounds on which *Ramamurti Dhora v. The Secretary of State for India in Council* ¹ was decided were questioned in a judgment of the Calcutta High Court in *Peari Mohan Shaha v. Durlavi Dassya* ² and the Court agreed with the view therein taken. The Court also refers to the judgment of the Privy Council in *Gokul Mandar v. Pudmanund Singh* ³, as laying down that the provisions of S. 11, Civil Procedure Code are exhaustive. With the greatest deference to the learned Chief Justice and the other learned Judge, I think that the language of the Board has been misconstrued. I do not think the Board ever intended to lay down that there was no such thing as an estoppel by judgment outside the Civil Procedure Code. I have elsewhere (Second Appeal No. 1888 of 1919), expressed my opinion that under the Civil Procedure Code the question is not strictly one of estoppel and that therein lies the distinction between *res-judicata* in India and before the courts in England. Under the Code the Court is prohibited from trying any issue in which the matter directly and substantially in issue has been heard and finally decided by a previous Court. The section operates to bar the jurisdiction of the Court to try and goes far further than the principle under which a party is estopped from offering evidence on an issue. Dealing with this question of want of jurisdiction to try a case the Board pointed out that the first Court must have jurisdiction to try the suit in which the issue is subsequently raised and that the words of the section could not be extended beyond their provision. I cannot read the words of the Board as meaning to lay down that consent decrees, decrees by default and other judgments in which the question at issue has not been heard and decided cannot be pleaded as estoppels. In

1. (1911) I. L. R. 36 Mad. 141.

2. (1914) 18. C. W. N. 954.

3. (1902) I. L. R. 29 Cal. 707.

In re South American and Mexican Co. : Ex-parte Bank of England ¹ Lord Herschell delivering the judgment of the Court of Appeal stated with regard to judgments by consent that it "is intended to put a stop to litigation between the parties just as much as a judgment which results from the decision of the Court after the matter has been fought out to the end." Therefore I cannot think that the Board intended to lay down that there can be no estoppel by judgment outside the Civil Procedure Code.

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In *Peari Mohan Shaha v. Durlavi Dassya* ² Jenkins, C. J. and Mookerjee, J. seem to have thought that they were bound by the decision of the Privy Council in *Gokul Mandur v. Pudmanund Singh* ³ on the subject of *res-judicata* to hold that no estoppel by judgment could be pleaded. But they held that the previous judgment was cogent evidence against an assignor of one of the parties to the previous suit. In this case the person whom it is sought to bind is not an assignee who would of course be bound by S. 11 or an assignor, but the actual party himself. I cannot therefore agree that what was decided in that case is any authority against the weight of the decisions in *Srinivasa Aiyangar v. Arayar Srinivasa Aiyangar* ⁴ and *Ramamurti Dhora v. The Secretary of State for India in Council* ⁵.

Reliance was placed by the respondent on *Arunuga Mudaliyar v. Krishnasami Naicken* ⁶. In that case the correctness of the doctrine laid down in *Suppa Bhattar v. Suppu Sockayya Bhattar* ⁷ was considered. But that seems to me to have no bearing on the question raised here. It seems to me that the only answer to the reported decisions in *Srinivasa Aiyangar v. Arayar Srinivasa Aiyangar* ⁴ and *Ramamurti Dhora v. The Secretary of State for India in Council* ⁵ is the suggested effect of dictum of the Privy Council referred to by the learned Chief Justice. I venture to think that it in no way lays down anything at variance with the effect of estoppel by judgment outside *res-judicata*. But as it has been doubted and as the question is in my opinion one of great importance, I would refer the matter to a Full Bench, the question referred being whether in the circumstances of this case it is open to

1. (1895) 1 Ch. 87.

2. (1914) 18 C. W. N 95.

3. (1902) 1 L. R. 29 Cal. 707.

4. (1910) 1 L. R. 38 Mad. 483.

5. (1911) 1 L. R. 36 Mad. 141.

6. (1917) 42 I. C. 498.

7. (1915) 29 M. L. J. 568.

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the plaintiff to re-assert a title which was definitely negated in a previous suit against a contesting claimant.

Krishnan, J. :—The first question argued before us is the one raised in issue 3 whether the plaintiff's right to the office of Asari Sheriff and its emoluments is concluded against him by reason of the decision in the prior litigation between him and his nephew Syed Kadir Badsha Sahib which ended in Second Appeal No. 726 of 1913. In that Second Appeal it was decided that plaintiff had no title to the office. The Government contend in this suit that Badsha Sahib is the proper office-holder entitled to the Yeomiah allowance attached to the office and not the plaintiff and that the question of title to the office is *res judicata* between him and the plaintiff and that they are entitled to rely on the plea in this suit and the plaintiff cannot re-open the question.

For this contention of the Government reliance is placed by the learned Government Pleader on the rulings in *Srinivasa Aiyangar v. Arayar Srinivasa Aiyangar* ¹ *Boyinapalli Venu-gopala Rao v. Nekkalapudi Venkatrayudu* ² *Ramamurti Dhora v. The Secretary of State for India in Council* ³ and *Suppa Bhattar v. Suppu Sakkaya Bhattar* ⁴ which are in his favour. But on the other side our attention has been drawn to the case in *Peari Mohan Shaha v. Durlavi Dassya* ⁵ and the unreported judgment of the learned Chief Justice and Seshagiri Aiyar, J. in S. A. No. 1747 of 1919, both of which dissent from the view expressed on the point in the cases cited by the Government Pleader. In this state of conflict of authorities, I agree to the reference of the question to a Full Bench.

In doing so, I would point out that the plea raised here is in my opinion not really that the issue as to plaintiff's title is *directly res judicata* between him and the Government but that it is *res judicata* between him and the person whose title the Government is setting up and that the Government is entitled to rely on that plea in establishing that title and defeating the plaintiff's claim. In other words, we have here a plea of *jus tertii* and when such a plea is raised the question of title or the *jus* set up has to be decided as if it arose between the party against whom it is set up and the *tertius* or third party. In

1. (1910) I L R 33 Mad 483.

2. (1911) 10 M. L. J. 450.

3. (1911) I. L. R 36 Mad. 141

4. (1915) 29 M. L. J. 558.

5. (1914) 18 C. W. N 954.

such a case, it seems to me that the person setting up the *jus tertii* is entitled to rely on all pleas that would have been available to the third party to prove his title whether it be one of estoppel by *res judicata* or otherwise. Similarly he will also be bound by all pleas available against that third party. Even admissions made by that party could be relied on against him.

The question therefore in cases like the present is not in the first instance a question of *res judicata* between the parties to the subsequent suit but a question of what pleas a party is entitled to set up when he pleads *jus tertii*. On raising the plea of *res judicata* between the tertius and the opposite party he must show that the plea is well founded between them under S. 11, Code of Civil Procedure before he can succeed. I do not think it is necessary to pray in aid any principle of *res judicata* outside the scope of S. 11, Code of Civil Procedure in this case. To do so would be against the opinion expressed by the Privy Council in *Gokul Mandar v. Pudmanund Singh*³ and is not justifiable. So far as the plea involves the question of *res judicata* between plaintiff and Badsha that question must be decided under S. 11 itself. If the *res judicata* pleaded is established under S. 11 the next question will be whether the defendant can rely on it against the plaintiff; and that is not a question governed by S. 11 at all but by considerations of what pleas are available to a person setting up a *jus tertii* under the general law. It seems to me that confusion arises in not keeping the two parts of the question distinct and separate. If the Government were not setting up a *jus tertii* but were only pleading that the finding in the former suit was *res judicata directly* between them and the plaintiff against the plaintiff's title without admitting and setting up Badsha's title it would be difficult to support their contention as they were not parties to the previous litigation nor can they be said to claim under any of those parties. The finding clearly does not bind them of its own force and they cannot take advantage of it simpliciter. It is only so far as they set up the third party's title that the plea of *res judicata* is available for or against them.

As the matter will be fully argued before the Full Bench, I have only briefly indicated my view; it will reconcile the earlier rulings of this Court with the dictum of the Privy Council.

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The Government Pleader (C. Madhavan Nair) for the appellant.

S. Varadachariar and *A. Srirangachari* for the respondent.

The Court delivered the following

Judgments :—*The Chief Justice* :—The question is whether the plaintiff is estopped from bringing this suit against Government to recover the emoluments attached to the office of Mutawalli of the suit wakf, an office which he now alleges to be descendible by usage to the nearest qualified male heir of the last holder of the office, by reason of the dismissal of the previous suit instituted by him against his elder brother, the then 1st defendant, and that brother's son, the then 2nd defendant, for a declaration that their father's will nominating such 2nd defendant and the plaintiffs own son to succeed him in the office was invalid, and that the plaintiff by reason of his elder brother's insanity was entitled to succeed to the office and its emoluments and for an injunction restraining them from interfering with him. The suit was dismissed in Second Appeal by the High Court which held that the plaintiff had clearly no title to the office and that the appeal had been rightly dismissed by the Lower Appellate Court. The Lower Appellate Court held that in the absence of any special provision or usage the office devolved on the nominee of the last Muttawalli, and declined to allow the plaintiff to set up a case of usage which had been abandoned in the Lower Court and which was not proved. In the present case the plaintiff has pleaded that he is entitled to succeed by the usage of the institution, and the defendant, whilst admitting that the plaintiff's father was "an hereditary holder of the Yeomiah allowance," has denied the plaintiff's right and also relied on the decree in the previous suit as barring the present suit.

As regards the general question our decision should in my opinion be based on the provisions of the Civil Procedure Code and the Evidence Act and on the English Law on which they are founded. The Privy Council in *Imambandi v. Mutsaddi*¹ has deprecated the practice of referring to foreign decisions and observed that the judgments of foreign Courts based often on considerations and conditions totally differing from those applicable or prevailing in India are only likely to confuse the administration of justice, and the warning is speci-

1. (1918) I. L. R. 45 Cal. 878 at 904 P. C.

ally applicable with regard to subjects which are dealt with in Indian Codes based on English precedents.

In England, as observed in *Roscoe's Nisi Prius* p. 190, "the judgment of a Court of concurrent jurisdiction directly upon a point is, as a plea, a bar, and, as evidence, conclusive upon the same matter between the same parties," and he goes on to explain that it is conclusive (as an estoppel) where there is an opportunity of pleading it; but that, where there is no such opportunity, it is conclusive as evidence. In India S. 40 of the Evidence Act makes a previous judgment relevant on the question whether it by law prevents the Court from taking cognizance of a suit or holding a trial. The law which prevents the Court from taking cognizance of a suit or holding a trial is to be found in S. 11 of the Code of Civil Procedure, which only prohibits the trial of a suit or issue which has been directly and substantially in issue in a former suit between the same parties or "between parties under whom they or any of them claim, litigating under the same title". Now the effect of this section read with S. 9 in my opinion is to preclude the Court from refusing to try a suit or issue which was not between the same parties but between one of such parties and a third person, because as observed by the Privy Council in *Gokul Mandar v. Pudmanund Singh* ¹ "the essence of a Code is to be exhaustive on matters in respect of which it declares the law, and it is not the province of a judge to disregard or to go outside the letter of the enactment according to its true construction." It is true that as held by the Privy Council in *Ram Kripal Shukul v. Mussumat Rup Kuari* ² and in a very recent case of *Hook v. Administrator General of Bengal* ³ this section is not to be read as entitling a party to reagitate a matter decided at an earlier stage of the same suit; and it is also true that it does not prevent consent decrees from operating as an estoppel; but it does in my opinion prevent the Court from refusing to try suits or issues by reason of previous judgments not between the same parties, a sort of estoppel unknown to English Law, especially as the Evidence Act closely following the English Law contains express provisions as to the general effect of previous judgments in evidence. S. 41 makes certain judgments of a Court in the exercise of a Probate,

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1. (1902) I. L. R. 29 Cal. 707, 715.

2 (1887) L. R. 11 I. A. 37.

3. (1920) 40 M. L. J. 423.

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Matrimonial, Admiralty or Insolvency Jurisdiction not only relevant but conclusive evidence of certain matters. Having dealt with such judgments, which are usually known as judgments in *rem*, the Act goes on to deal with other judgments generally known as judgments in *personam*, and provides in S. 42 that they are "relevant if they relate to matters of a public nature relevant to the inquiry," but are not conclusive proof of what they state, and in S. 43 that all other judgments are irrelevant unless the existence of such judgment is a fact in issue or relevant under some other provision of this Act, and under those other provisions the judgment may be relevant but cannot be conclusive in law though it may in fact. Thus in *Brew v. Haren* ¹ where the question was whether the plaintiff was the owner of the foreshore, the facts that he had successfully prevented people from taking seaweed from the shore and that he had instituted a suit for trespass in which there was a reference to arbitration and an award in his favour were held evidence of ownership. Similarly if, in a suit where the previous judgment is not *res judicata* under S. 11 C. P. Code a question should arise whether certain property belonged to A or B a judgment by which A had recovered possession on his title from B by a decree which had become final might be just as conclusive evidence as a conveyance from B to A irrespective of the question whether the previous judgment was right or wrong. A previous judgment between altogether different parties might even be conclusive in the same way, as in *R. v. Hebden* ² the report of which in Selwyn's Nisi prius Vol. 2, p. 1136 is referred to both by Taylor and Roscoe. That was a *quo warranto* to try the defendant's right to be a bailiff of Scarborough. He relied on his election under two former Bailiffs. The prosecution denied that they were bailiffs, and on this issue, tendered a judgment of ouster against the two bailiffs in question. On a motion for a new trial, it was held that the evidence was rightly admitted, the Court observing "The defendant has made the title of Batly and Armstrong (the previous bailiffs) part of his right, and if he gives evidence of the right of their election, can that better be disproved than by a judgment of ouster wherein such election is declared to be void." Reference may also be made to the provisions of the Specific Relief Act which expressly provides in S. 43, that declaratory decrees made under

1. 9 Ir. C. L. 29 and 11 Ir. C. L. 198.

2. E. 12 Geo. 2.

S. 42 shall not be binding except on the parties to the suit and those claiming under them.

As regards the present case, all that was decided in the previous suit was that the present plaintiff had not pleaded or proved in that suit that there was any special usage as to the descent of the office in question which would render the ordinary Mahomedan Law inapplicable. The previous judgment not being between the same parties does not in my opinion estop them from setting up such a special usage in the present suit against the present defendant who was no party to the suit. In *Srinivasa Iyengar v. Arayar Srinivasa Iyengar* ¹ the learned Judges relying on a passage in Bigelow's Treatise on the Law of Estoppel adopt the rule that judgments in *personam* establishing the relations between parties are an exception to the general rule that judgments in *personam* bind only parties and their privies.

The Judgment in *Ramamurthi Dhora v. The Secretary of State for India in Council* ² after referring to some dicta of Lord Coke which it is now admitted apply to judgments in *rem*, quotes the following extract from Bigelow "if all who have a right to appear and be heard in a cause have been duly made parties the judgment establishes a perfect and complete right against all, as much as would a conveyance of a joint estate by all the parties interested. Judgment in an action strictly in *personam*, indeed, bind, third persons in that way; all that is necessary is that all those who have the exclusive right to litigate the cause are proper parties to it and that the question should be determined without collusion. Judgment that A is debtor of B is an example.

Indeed, the difference between judgments in *rem* and judgments in *personam* in any law, as regards their effect, appears at bottom to be only a difference of "degree". However attractive this doctrine may appear to be, it is in my opinion opposed to the provisions of the Indian Evidence Act, which was not referred to either in this or the earlier decision, and in my opinion precludes the reception of the American rule in India. That rule is in my opinion in conflict with the provisions of our statute law. This is in effect the view taken by Jenkins, C. J. and Mookerjee, J. in *Peari Mohun Shaha v. Durlavi Dassya* ³.

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1. (1910) I. L. R. 33 Mad. 483 : 20 M. L. J. 546.

2. (1911) I. L. R. 36 Mad. 141.

3. (1914) 18 C. W. N. 954.

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I would therefore answer the question in the affirmative and overrule *Srinivasa Iyengar v. Arayar. Srinivasa Iyengar* ¹ and *Ramamurthi Dhora v. Secretary of State for India in Council* ².

Spencer, J. :—At the very commencement of the arguments I drew attention to Ss. 40, 41, 42 and 43 of the Indian Evidence Act which appeared to me to be exhaustive of the question of the relevancy of judgments other than those which operate as a bar to the trial of a suit or issue between the same parties or their privies under the law of *res judicata* contained in S. 11 of the Civil Procedure Code. These sections of the Evidence Act have not been referred to in the order of reference or in the judgment of the two Courts below in dealing with the effect of the judgment in the prior suit (O. S. No. 274 of 1911).

As regards the decisions in *Srinivasa Aiyangar v. Arayar Srinivasa Iyengar* ¹ and *Ramamurthi Dhora v. The Secretary of State for India in Council* ² I agree with my Lord in thinking that they went too far in extending the principle of estoppel by judgment beyond the limits of our Codes of Procedure and Evidence, and that they should be overruled as being in contravention of the principles laid down by the Privy Council in *Gokul Mander v. Pudmanund Singh* ³ for the interpretation of codified law and as being examples of the tendency since deprecated by their Lordships in *Imambandi v. Mutsaddi* ⁴ of referring to foreign decisions.

With the exception of the above two decisions of this Court and the case in *Boyinapalli Venugopalau Rau v. Nekkala-pudi Venkatrayudu* ⁵ which followed the earlier of them, and the case in *Suppa Bhattar v. Suppa Sockayya Bhattar* ⁶ and *Rahim-Un-nissa Begam v. Srinivasa Aiyangar* ⁷ which were cases of privity of estate, our attention has not been called to any authoritative ruling of a High Court in this country which would support the return of any other answer but an affirmative one to the question referred to us.

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 swami
 Sastri, J.

Kumaraswami Sastri, J. :—The question raised by the reference is whether it is open to a party to reassert as against a third person a title which has been definitely negated in a previous

1. (1910) I. L. R. 38 Mad 483.

2. (1911) I. L. R. 36 Mad. 141.

3. (1902) I. L. R. 29 Cal. p. 707.

4. (1918) I. L. R. 45 Cal. p. 878.

5. (1911) 10 M. L. T. 450.

6. (1915) 29 M. L. J. 558.

7. (1920) 88 M. L. J. 266.

suit against a contesting claimant. The judgment which is pleaded in bar is a judgment in a previous suit filed by the present plaintiff against two other persons for a declaration that he was entitled to the Asari Sheriff and to recover from the Government the emoluments of the office. It was held in that suit that the plaintiff did not prove title to the office and the suit was dismissed. The present suit is filed by the plaintiff against the Government to recover a sum of Rs. 394 alleged to be due to him as the person entitled to the Asari Sheriff and to perform the services connected therewith. The Government was paying the sums to the successful party in the previous litigation and sets up the judgment negativing the plaintiff's right as a bar to the suit.

The question is how far and under what circumstances can a judgment *in personam* be given the force of a judgment *in rem* or be pleaded as a bar under S. 11 Civil Procedure Code in cases where it is pleaded as a defence to an action, by third parties who do not claim under or were not represented by the parties to the original action.

So far as the statute law in this country is concerned, the case is governed by S. 11 of the Civil Procedure Code which deals with *res judicata*, Ss. 40 to 44 of the Evidence Act which deal with the relevancy of judgments of competent Courts and S. 43 of the Specific Relief Act which deals with declaratory decrees.

Under S. 11 of the Civil Procedure Code one of the conditions precedent to its application is that the former suit should be "between the same parties or between parties under whom they or any of them claim" and the section is a bar to the trial of a suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in the previous suit. The section codifies the law in British India as regards the plea of *res judicata* and, though the principle has been applied to proceedings other than suits (*e. g.*) execution proceedings), the essentials required by the section as to identity of the questions involved and parties has not been lost sight of. S. 43 of the Specific Relief Act enacts that a declaratory decree passed under the Act is binding only on the parties to the suit, persons claiming through them respectively, and, where any of the parties are trustees, on the persons for whom, if in existence at the date of the declaration, such parties would be trustees

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Ss. 40 to 44 of the Evidence Act deal with the relevancy of judgments of Courts of Justice. S. 40 enacts that the existence of any judgment, order or decree which by law prevents any Court from taking cognizance of a suit or holding a trial, is a relevant fact when the question is whether such Court ought to take cognizance of such suit or to hold such trial. S. 41 deals with final judgments, orders or decrees of competent Courts in the exercise of Probate, Matrimonial, Admiralty or Insolvency jurisdiction, or what is known as judgments *in rem*, and it states that such judgments, orders or decrees are conclusive proof of the matters specified in the section ; and, by virtue of S. 4 of the Evidence Act, evidence cannot be allowed to disprove the facts established by such judgments. S. 42 refers to judgments relating to matters of a public nature relevant to the enquiry and the section states that such judgments, though evidence, are not conclusive proof of that which they state, thus allowing evidence to be given to disprove the facts found in the judgments. S. 43 says that judgments, orders or decrees, other than those mentioned in Ss. 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provision of the Act (e. g. S. 13). S. 44 enables a party to show that any judgment, order or decree which is relevant under S. 40, 41 or 42, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

In dealing with this question, I think the distinction between the effect of a judgment as preventing the Court from trying the same matter in issue in subsequent proceedings and as simply affording evidence of the truth or falsity of the claim under consideration should be borne in mind. In the former case S. 11 declares that the Court shall not try the suit or issue and the plea is one in bar to the maintainability of the action. In cases where there is no bar under S. 11, the Court has to try the issue and if the judgment is filed for the purpose of proving the plaintiff's claim or for the purpose of proving the defence to the action, it is relevant only as a piece of evidence the probative value of which is regulated by the provisions of the Evidence Act. If it is a judgment *in rem*, the Court under S. 41 of the Evidence Act will treat it as conclusive proof of the matters stated in that section and under S. 4 it will prevent evidence from being given for the pur-

pose of disproving the facts established by the judgment *in rem*. One has only to file the judgment and the Court has no option but to decide the matter covered by it in accordance with the declaration in that judgment, even though the other party may be in a position to prove facts to the contrary. So far as judgments *in rem* are concerned, I think the matter is codified by S. 41 of the Evidence Act which states what judgments would be judgments *in rem* so as to make them conclusive proof of the declarations granted by them. It seems to me that it is not open to us, in the face of the sections of the Civil Procedure Code, the Evidence Act and the Specific Relief Act, to hold that judgments not falling within those sections would still be a bar to an action or afford conclusive proof. This in effect, would be to create new kinds of *res judicata* and to destroy the distinction between judgments *in rem* and judgments *in personam* which has been laid down in Ss. 41 and 42 of the Evidence Act.

In *Ramamurthi Dhora v. The Secretary of State for India in Council* ¹ it was held that the provisions of S. 13 of the Code of 1882 were not exhaustive and a judgment was held to be binding on a person who was no party to it on the ground that third parties having no interest in the property at the time of the litigation cannot, in the absence of any fraud or collusion, question the validity of a judgment passed in a suit between the only parties interested in the property at the date of the previous suit. Reference was made to Bigelow on Estoppel, 5th Edition, page 44, where the learned author observes "If all who have a right to appear and be heard in a cause have been duly made parties, the judgment established a perfect and complete right against all, as much as would a conveyance of a joint estate by all the parties interested. Judgment in an action strictly *in personam*, indeed, binds third persons in that way; all that is necessary is that all those who have the exclusive right to litigate the cause are proper parties to it, and that the question should be determined without collusion. Indeed, the difference between judgments *in rem* and judgments *in personam* in our law, as regards their effect, appears at bottom to be only a difference of degree." Where a judgment is *in personam* I can find no authority either in English decisions or recognised works by English decisions or recognised works by English

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Jurists holding that it can prevent persons, not parties or privies, from agitating the question except in cases of joint liability and covenants for indemnity. In *The Natal Land, etc., Co., v. Good* ¹ it was sought to use a judgment between the mortgagor and the person from whom he purchased the property which found that the sale was vitiated by fraud against a mortgagee who was no party to the suit. Their Lordships of the Privy Council observed, "Now the first observation which occurs is that this judgment was not admissible in evidence. It is the only proof of the fraud, but if it were ample and sufficient proof of the fraud, it is *res inter alios acta*, and in no Court of Law or Equity in this country would it have been admitted at all, except as between the parties to it, the respondents and Crowley, or if a foundation for it had been laid by evidence of some fraud having been committed by which the plaintiffs could be affected." In *Anderson v. Pollison* ² it was held that a judgment in affiliation proceedings taken by the daughter of the plaintiff holding that it was not proved that the defendant was the father was not final and conclusive in an action for seduction filed by the mother so as to estop the defendant from denying that he was the father of the child as the parties to the two proceedings were different. In *Spencer v. Williams*, ³ Lord Penzance observed, "It is proper therefore, where the question is raised between the same parties, or those claiming under them, that they should be estopped; but the decisions give no authority for a proposition of a wider character that a party who was not a party in the original litigation, shall be bound by the result." The rule was held to apply though the interest of the parties was identical and the same question was involved, namely, whether a person was next of kin and entitled to distribution of assets of the deceased. In *Lady Wenman v. Mackenzie* ⁴ the plaintiff sued for injury to her reversionary right alleging that she was entitled to a fishery in an arm of the sea and was in possession through her tenant Fairman and that the defendant who held the neighbouring property under one Gipps infringed her right. Fairman, her tenant had filed an action to recover damages for a similar injury against Gipps and the suit was referred to arbitration, and an award made in favour of Fairman. It was held that the

1. (1868) L. R. 2 P. C. A. C. 121.

2. (1901) 2 K. B. 107.

3. (1871) L. R. 2 P. and D. 230.

4. (1855) 5 E. and B. 447.

proceedings were not evidence as plaintiff "did not claim by, through or under Fairman and, so far as she was concerned the action of *Fairman v. Gipps* was *res inter alios acta*" and as the proceedings and award could not have been admitted as evidence against her, they are not admissible for her. In *Petrie v. Nuttal* ¹ it was held that the conviction of a person for barring a highway would not bar a suit by the same person against another for stopping at the road on the ground that the Crown and subject were the parties to the indictment and therefore it was not between the two parties to the action and that the judgment in the indictment may be given as evidence upon the trial of the issue as to whether the *locus in quo* is a public highway ; though it cannot be pleaded as an estoppel.

Estoppel must be mutual and it is difficult to see how a party not bound by a judgment can set it up in bar against a party to it.

Turning to the question as to whether a judgment in *personam* can acquire the force of a judgment *in rem* under any given set of facts, the only authority which I can find for such a view is the passage from Bigelow already referred to and the decision in *Cander v. Lord* ² referred to in *Sreenivasa Iyengar v. Arayar Srinivasa Iyengar* ³ as authority for the view taken in that case.

With all respect it seems to me that we cannot travel outside the provision of S. 11 of the Code of Civil Procedure and apply the rule of *res judicata* to cases falling outside the limitation imposed by the section. In *Gokul Mandar v. Pudmanund Singh* ⁴, their Lordships of the Privy Council observe. "They will further observe that the essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction." In *Peari Mohan Shaha v. Durlavi Dassya*, ⁵ the question arose in a suit between an auction purchaser who bought the right of one Durlavi Dassya, and her daughter Patteswari whose suit under S. 283 of the Code (relating to suits by an unsuccessful claimant) was dismissed. The suit was filed by the purchaser against the unsuccessful claimant for a declaration of her title

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1. 11 EICH. 589.

2. 2 N. Y. 289.

3. (1910) 33 Mad. 873.

4. (1902) 1 L. R. 29 Cal. 707.

5. (1914) 18 C. W. N. 954.

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and the decree in the previous suit was sought to be availed of as concluding the matter in issue. Jenkins, C. J. and Mookerjee, J., were of opinion that the provisions as to *res judicata* contained in S. 11 of the Code were exhaustive and that judgments in suits between third parties however cogent they might be as evidence where the same matter is in question in a suit by or against a stranger did not operate as a bar to the suit under S. 11 of the Code. Jenkins, C. J., observed, "It appears to me that in these circumstances and having regard to the facts with which we have to deal in this case, the result of that litigation is at least as cogent against the defendant as would have been an instrument of transfer executed by Patteswari, the ostensible owner, in favour of her sons. I wish to make it clear that in the view I take, I cannot regard the decree in the previous litigation as amounting to *res judicata* which would bar all possibility of evidence on the part of the defendant. It would, I conceive, have been open to the defendant to show that, notwithstanding that decree, there were circumstances either vitiating the result of that litigation or affecting its result so as to prevent its operation in favour of Patteswari's sons." The learned Judges were not prepared to follow the dictum in *Ramamurthi Dhora v. The Secretary of State for India in Council* ¹ that the provisions of the Civil Procedure Code were not exhaustive and judgment not inter parties can make the question *res judicata*. This decision was referred to and followed by the Chief Justice and Seshagiri Iyer, J., in Second Appeal No. 1747 of 1919. The learned Judges were of opinion that the provisions of the Code as to *res judicata* were exhaustive and that a judgment not between the same parties or their privies was only evidence of title. They were not prepared to follow *Ramamurthi Dhora v. The Secretary of State for India in Council* ¹ and *Suppa Bhattar v. Suppu Sockayya Bhattar* ² on the ground that the attention of the learned Judges was not drawn to the decision of the Privy Council in *Gokul Mandar v. Pudmanand Singh* ³. In *The Ramnad Zamindar v. Doraswami* ⁴ which related to a monthly allowance, it was held that a litigation as regards the right to receive the allowance would not estop the Zamindar from putting the party claiming it against him to the proof of his title on the ground that he was not a

1. (1911) I. L. R. 36 Mad. 141.

3. (1902) I. L. R., 29 Cal. 707.

2. (1914) 29 M. L. J. 558.

4. (1884) I. L. R. 7 Mad. 341.

party to the previous litigation. So far, therefore, as the Civil Procedure Code is concerned, I do not think that the trial of a suit or issue can be barred because of an adjudication in a prior suit or proceeding to which the plaintiff was not a party or privy.

Turning to the Evidence Act, I have already pointed out that Ss. 41 and 42 draw a distinction between Judgments *in rem* and Judgments *in personam* and it seems to me, to be clear from the sections that a Judgment which does not fall within S. 41 can only be evidence but cannot be used for the purpose of preventing the other side from proving facts which he sets up.

It is not open to us to import considerations as to convenience in dealing with matters which have been codified and dealt with by Evidence Act however attractive the theory may be and however much one would like to have the principle embodied by the legislature in the codes. It is no doubt true that there are decisions of this Court which adopt the view of Bigelow as to Judgments *in personam* creating an estoppel as against strangers (see *Srinivasa Iyengar v. Arayar Srinivasa Iyengar* ¹; *Ramamurthi Dhora v. The Secretary of State for India in Council* ²; *Suppa Battar v. Suppu Sakkaya Bhattar* ³ and *Boyinappalli Venugopala Rao v. Nekalapudi Venkatrayadu* ⁴). In the last of these cases it was held that a decision between the plaintiff and another person that the latter is a co-proprietor with him is conclusive on third parties where the contention raised by them depends on the relationship between the plaintiff and such person and the learned Judges followed *Srinivasa Iyengar v. Arayar Srinivasa Iyengar* ¹ but they, however, observed that the rule that makes the decision conclusive on third parties was not the rule of *res judicata* and they based their decision on the ground that it would be intolerable to hold that, when the relationship between the two parties have been determined by litigation between them, other persons, can contend that one of them has not the right against the other which he has been held to have.

With all respect it seems to me that these decisions do not take into consideration the effect of the provisions of the Evidence Act and the limitations imposed by a consideration of those sections. To hold that a Judgment which does not fall

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1. (1910) I. L. R. 38 Mad. 483.

3. (1916) 29 M. L. J. 558.

2. (1911) I. L. R. 36 Mad. 141.

4. (1911) 10 M. L. T. 450.

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under S. 41 is conclusive proof would be to act in direct contravention of the provisions of S. 42 which declares that Judgment, orders or decrees, other than those mentioned in S. 41 are relevant but not conclusive proof.

It seems to me that where a judgment *in personam* is pleaded, its legal effect and probative force will depend upon the facts of each case. As pointed out by Sir Lawrence Jenkins in the case I have referred to, the judgment of a competent Court whereby a declaration is made as regards property in dispute would have the force of a conveyance by the other parties to the suit in favour of the successful litigant. Where, therefore, all the parties interested in the immoveable property or in the right in contest have been parties to the previous litigation it may be that the judgment obtained in the previous litigation would render it impossible for persons to get rid of the effect of the judgment. But this is not because the judgment constitutes *res judicata* of judgments *in rem*. The difficulty would be analagous to the difficulty of a person who wants to impeach the title which is conferred on his opponent by all the persons who could have a legal interest in the property with the additional fact that when a judgment is relevant it is not open to a party to show that as between the parties the conclusion arrived at by the Judge is wrong and is not warranted by the evidence. The decision in *Suppu Bhattar v. Suppa Sakkayya Bhattar*¹ may be supported on the ground as all the parties interested were parties to the previous litigation in favour of one of them. Cases where *jus tertii* is set up are really no exceptions to the rule. In all cases of *jus tertii* the person who sets up the rights of a third party is bound to prove that the third party has or had the rights alleged and it is always open to the other party to displace the title of the person so set up by showing that he was a party to the litigation which has negatived that title. Whatever would estop or bar the persons whose title is set up must also bar the person pleading *jus tertii* whether the estoppel is by record, deed or *in pais*. This is the principle on which *R. V. Herden* referred to by my Lord was decided. The defendant relied on his right to the office of bailiff owing to his having been elected by two former bailiffs. A judgment was produced in which the right of the persons whom he set up was negatived and it was held that having made the title of the

previous bailiffs part of his right, there could be no better evidence in disproof other than the judgment where their rights were negatived.

I would hold that the decision in the previous suit is not conclusive but is only evidence and that it is open to the plaintiff to establish his title as against the Government and I would answer the question raised by the reference in the affirmative.

C. A. S.

Reference answered in the affirmative.

IN THE HIGH COURT OF JUDICATURE AT MADRAS
FULL BENCH.

PRESENT :—SIR JOHN WALLIS, CHIEF JUSTICE, MR. JUSTICE SPENCER AND MR. JUSTICE KUMARASWAMI SASTRI.

Muthoora Palliath Purakkot Paru

alias Pathumma and others ... *Appellants * Plaintiffs*).

v.

Muthoora Palliath Purakkot ... *Respondents. (Defendants*

Raman Nambiar, (Karanavan 1 to 9 and 11 to 17).

and Manager of the Tavazhi

Tarwad) and others

Malabar Law—Tarwad—Conversion of a member to Mahomedanism—Right to partition—Removal of Caste Disabilities Act (XXI of 1850).

Apostasy from Hinduism does not entitle a member of a Malabar tarwad to claim partition of the tarwad property and delivery to him of his share under Act XXI of 1850. The effect of conversion to an alien religion is not to enlarge the convert's interest in any property or to get rid of any condition or restriction to which it was originally subject.

Observations in *Kunhi Chakkan v. Lydia Arucanden* (1) to the contrary overruled.

Second Appeal against the decree of the Court of the Temporary Subordinate Judge of Tellicherry in Appeal Suit No. 490 of 1918, preferred against the decree, of the Court of the Principal District Munsif of Tellicherry in Original Suit No. 425 of 1916.

C. Madhavan Nair, for the appellants.

C. V. Anantakrishna Aiyar, for respondents 1 to 7 and 10 to 15.

B. Pocker, for respondents 9 and 16.

The Court (Sadasiva Aiyar and Coutts Trotter, JJ.) made the following

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ORDER OF REFERENCE TO A FULL BENCH :—

The questions of law involved in this case are of great importance. We are aware that a case involving similar questions was considered and decided by a Bench of this Court in *Kunhichekkan v. Lydia Arucanden*.¹ The effects of that decision seem to have been considered as so far reaching and almost revolutionary that the lower Courts, have notwithstanding that decision dismissed the suit of the plaintiffs (Mussalman converts) claiming partition of Marumakkathayam property. Both sides agree that the case is one fit to be decided by a Full Bench so that the matter might be settled authoritatively as far as possible. Under R. 2 of the Rules of the High Court Appellate Side, we refer to a Full Bench the "matter" (that is, this whole case) as its "determination involves a question of law" of such importance.

C. *Madhavan Nair*, for appellants.

C. V. *Anantakrishna Aiyar* and B. *Pocker* for respondents.

The Court delivered the following

Wallis, C. J.

Judgments :—*The Chief Justice* :—If it were not for the authorities the question would appear to be free from difficulty. There is no doubt that under Hindu Law a member of a Marumakkathayam Tarwad on his conversion to Mahomedanism would forfeit all interest in the tarwad property. Act XXI of 1850 however provides that any law or usage which inflicts on any person forfeiture of rights or property by reason of his renouncing his religion or being deprived of caste shall cease to be enforced as law. The effect of this statute would appear to be that a convert's interest in the tarwad is unaffected by his conversion. As has been pointed out in *Matungini Gupta v. Ram Rutlon Roy*² by Wilson, J., the effect is not to enlarge the convert's interest in any property or to get rid of any condition or restriction to which it was originally subject. It would therefore appear to be a sufficient answer to the reference to say that conversion to Christianity cannot give a member of a tarwad a right to a partition of tarwad property which is impartible under the Marumakkathayam Law. It has however been held in *Kunhichekkan v. Lydia Arucanden*¹ that the conversion of two sisters to Christianity dissolved the coparcenary till then existing between them and their brother as a tarwad and had

1. 1912 M. W. N. 586.

2. (1891) I. L. R. 19 Cal 289, 291. (F. B.)

the effect of converting them into tenants-in-common of the tarwad property without rights of survivorship, and, if this be so, it may be said that a right to partition is an ordinary incident of tenancy-in-common. The proposition that conversion has the effect of depriving the convert of his right of survivorship which may often be a most valuable right, as when the joint family consists of an old father and two brothers, one of whom becomes a convert, appears to be opposed to the express provisions of the statute that conversion is not to involve any forfeiture of property or rights. It has however been accepted, *Kunhichekkan v. Lydia Arukandan* ¹ as good law not only in but also in *Kulada Prasad Pandey v. Haripada Chatterjee* ² in which three sons (two of whom had been converted to Christianity) sought to question an alienation made by the deceased father to defendants 1 to 4 as opposed to Hindu Law. It was held that the conversion of plaintiffs 1 and 2 though it did not deprive them of their interest in the joint family property had the effect of severing them in status, putting an end to rights of survivorship, and to the father's power to bind their share by alienation of family property for purposes neither illegal nor immoral. With this last question we are not now concerned. The judgment in both cases proceed on the authority of the decision of the Privy Council in *Abraham v. Abraham*. ³ Now that was not a case governed by Act XXI of 1850 or the earlier Bengal Regulation VII of 1832 as the family had been converted to Christianity long before they were passed, and the property in suit had all been acquired after conversion and it seems to me with great respect, that in the observations at page 237 on which reliance is placed as to conversion severing the convert from the family and putting an end to the co-parcenership, Lord Kingsdown was merely stating the undoubted effect under Hindu Law of conversion to another religion and was not considering the effect of Act XXI of 1850 on cases governed by it. Indeed, he expressly says so at page 239, and points out that Act XXI had no application to the case. "Such then being the state of the case so far as the Hindu Law is concerned, we must next consider whether there is any other law which determines the rights over the property of a Hindu becoming a convert to Christianity. The *Lex Loci* Act clearly does not apply, the parties having ceased to be Hindu

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1. (1912) M. W. N. 386.

2. (1913) I. L. R. 40 Cal. 407.

3. 9 M. I. A. 195.

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"in religion," Act XXI of 1850 had been described in the argument at page 218 as the *Lex Loci* in case of apostacy, and was clearly the Act referred to by Lord Kingdown. In a later case 33 All. 356 the Judicial Committee had to consider a case governed by S. 9 Bengal Regulation VII of 1832 the principle of which they held was extended to the rest of India by Act XXI of 1850. In that case there was a joint family consisting of one Ratan Singh and his son Daulat Singh. Ratan Singh became a Mahomedan in 1845, and subsequently Daulat Singh predeceased him. After the deaths of both their widows, a compromise was entered into by which Ratan Singh's daughter's daughter agreed to share the properties left by him with Daulat Singh's daughters. After the deaths of Daulat Singh's daughters, the sons of one of them set up that the compromise was not binding on them and contended that on the conversion of Ratan Singh the whole of the joint family properties became vested in his son Daulat Singh. This contention their Lordships rejected observing that "the effect of the Legislations of 1832 and 1850 was that on Ratan Singh's abandonment of Hinduism, Daulat Singh did not acquire any enforceable right to his father's share in the joint family property which he could either assert himself or transmit to his heirs for enforcement in a British Court of Justice." The daughters of Daulat Singh had obtained an 8½ annas share of joint family property in the compromise which was being attacked, and their Lordships had not to consider whether under the Bengal Regulation Daulat's share did not pass by survivorship on his death to his father Ratan Singh in spite of the latter's conversion to Mahomedanism. Mr. Ananta-krishna Aiyar on the other hand has relied on the observation of their Lordships as to the original imperfection of Daulat Singh's title when the case came before them on an earlier occasion in 31 All. 497, at page 504 as showing that their Lordships were then of opinion that on Daulat's death his interest passed by survivorship to his father Ratan Singh to the exclusion of his own daughters. These observations may, however, have been made with reference to the case then set up that the properties in suit were all the self-acquired properties of Ratan Singh. On the whole, I have come to the conclusion that there is nothing in any of the decisions to prevent us from giving effect to what appears to me to be the plain bearing of

Act XXI of 1850, and I must therefore hold that the plaintiffs are not entitled to a partition of the tarwad property by reason of their not being Hindus and that the appeal fails and must be dismissed with costs. The question of the plaintiff's right to succeed to the office of karnavan is not before us and I express no opinion about it as it may involve other considerations. The Second Appeal fails and is dismissed with costs of defendants Nos. 1 to 7 and 11 to 16.

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Spencer, J.—I agree with my Lord that the plaintiffs are not entitled to a partition of the tarwad property by reason of their becoming converts from Hinduism to Islam. It is clear from the preamble to the Removal of Caste Disabilities Act (Act XXI of 1850) that the effect of that Act was to preserve existing rights but not to confer any new rights such as a right of partition of property which did not exist before in the family to which the convert belonged. Impartibility being one of the incidents of a Marumakkathayam family, a right to partition could not be acquired in consequence of a change of religion.

Spencer, J

In the District Munsif's and Subordinate Judge's Courts the plaintiffs appear to have based their title to partition on the ruling in *Kunhichekkan v. Lydia Arucanden*¹. It was therein observed that the conversion to Christianity of two daughters, Lydia, and Salome, belonging to a Marumakkathayam family in Malabar, "operating on the joint family dissolved the co-parcenary which existed under the Marumakkathayam Law" and the converts "remained as co-owners and became tenants-in-common of their joint property".

That case might have been decided upon the short points that after Chandan died all the family being Christians were governed in matters of succession by the Indian Succession Act, that plaintiff having an interest in the property of her deceased husband Nathaniel had a right under S. 91 of the Transfer of Property Act to institute a suit for redemption, and that in a suit for redemption all persons interested should be joined as parties.

In a case of intestacy among converts to Christianity the children's rights of succession to the property of their converted parents are governed by the Indian Succession Act, and the rules of co-parcenary and survivorship of Hindu Law no longer apply; but if the parents were undivided co-parceners at the

1. 1912 M. W. N. p 386.

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time of conversion or at the time of the passing of the Succession Act, each parent will retain a vested interest in the coparcenership till he dies. That was the principle on which *Tellis v. Saldanha* ¹ was decided, and the position of the widow and daughter of Augustine Tellis therein was similar to the position of Lydia's children in the case in *Kunhichekkan v. Lydia Arucanden* ².

But where the parties are not Christians but Mahomedans after conversion, the Indian Succession Act has no application at all as Mahomedans are exempted under S. 331 of that Act from the provisions relating to intestate or testamentary succession to property. The Second Appeal should in my opinion be dismissed with costs of defendants Nos. 1 to 7 and 11 to 16.

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 swami
 Sastri, J.

Kumaraswami Sastri, J. :—I agree with the conclusions arrived at by My Lord and Spencer, J., whose judgment I have had the advantage of perusing.

I am of opinion that apostacy from Hinduism does not entitle a member of a Malabar Tarwad to claim partition of the tarwad property and delivery to him of his share. It is clear that a member of a tarwad has no right to claim partition as tarwad property is indivisible and no one member nor even all but one can enforce a division upon any who object. As this was not disputed at the hearing it is not necessary to refer in detail to the authorities which go back to a period as early as 1814. I need only refer to the following observations by Turner, C. J. and Muthusami Aiyar, J. in *Kunhamad Hajee v. P. P. Kunhamad Hajee* ³ "The law governing the property of a tarwad has not reached the same stage of development as the law regulating the joint property of the Hindu family. Not only in the former case is the succession traced to females but the property is indivisible so that the members of the family may be said to have rather rights out of the property than rights to the property. The family and not the individual is what we may term the social unit. The individual right of the members of the tarwad is so feeble that it is not competent to any one of them to insist on a partition. The males take interests in the tarwad property which endure only for their lives and do

1. (1886) I. L. R. 10, Mad. 69

2. (1912) M. W. N. p. 386.

3. (1881) I. L. R. 3 Mad. 169 at 174.

not pass to their offspring nor are available for the satisfaction of their private debts".

If a member while a Hindu has no right to claim partition against the will of the other members of the tarwad it is difficult to see how he acquires the right by apostasy. Act XXI of 1850 (Caste Disabilities Removal Act) it is argued gives him the right but the Act only prevents any law or usage from depriving a convert of rights or property or rights of inheritance which he had before conversion. I do not think that the Act can give to any party any right higher than that to which he is entitled under the law from which that right is derived. As observed by Wilson, J. in *Matungini Gupta v. Ram Rutton Roy* ¹ "a change of religion does not cause any forfeiture of property. But neither could it enlarge it nor get rid of any condition or restriction to which it was originally subject."

It is argued that conversion severs the co-parcenary and that consequently gives rise to a claim for partition and separate enjoyment. Reference has been made to *Abraham v. Abraham* ² and to *Kulada Prasad Pande v. Haripada Chatterjee* ³. *Abraham v. Abraham* ² was a case where the family had been Christian for more than one generation and there was no ancestral property. The observations of their Lordships of the Privy Council relate to cases governed by the ordinary Hindu Law applicable to Mitakshara families where partition is a right which can be exercised at the volition of any adult co-parcener. No question arose as to the effect of act XXI of 1850. Their Lordships observe "considering the case then with reference to parcenership what is the portion of a member of a Hindu family who has become a convert to Christianity. He became, as their Lordships apprehend, at once severed from the family and regarded by them as an outcaste. The tie which bound the family together is, so far as he is concerned, not only loosened but dissolved. The obligations consequent upon and connected with the tie must as it seems to their Lordships be dissolved with it. Parcenership may be put an end to by severance effected by partition : it must as their Lordships think equally be put an end to by severance which the Hindu Law recognises and creates. Their Lordships therefore are of opinion that upon the conversion of a Hindu to Christianity the Hindu

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1. (1891) I. L. R. 19 Cal. 289.

2. 9 M. I. A. 195.

3. (1913) I. L. R. 40 Cal. 407.

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Law ceases to have any continuing obligatory force upon the convert. He may renounce the old law by which he was bound as he has renounced his old religion or if he thinks fit he may abide by the old law notwithstanding he has renounced his old religion." It seems to me that these observations do not necessarily lead to the result that when by the very nature of the property no right to partition exists before conversion mere severance of the co-parcenary would give a person that right. Where before conversion partition without common consent cannot be claimed on any ground, severance effected by change of religion cannot give a right to partition. *Kulada Prasad Pandey v. Haripada Chatterjee* ¹ was also the case of one of the members of a Mitakshara family becoming a convert. Partition was a right to which the convert was entitled to before conversion and the severance of the co-parcenary created by the conversion gave him no new right. Where under the law governing the parties it is open to any one member to resist a partition it is difficult to see how his rights can be taken away because another member chooses to change his religion. The application of Act XXI of 1850 would in effect enlarge the right of the convert and cut down the right of the remaining members of the tarwad, a result which is unwarranted by the Act.

The only decision on the question as to the effect of conversion of a member of a tarwad is *Kunhichekan v. Lydia Arucanden* ² where Abdur Rahim and Sundara Ayyar, JJ., held that conversion of a member makes him a tenant-in-common. In that case one Acha had a son Chandan and two daughters. The daughters became converts to Christianity and assumed the names of Lydia and Salome. The parties were before conversion members of a Marumakkathayam tarwad and after conversion Chandan died. Lydia had a son Nathaniel who mortgaged the property and on his death his widow sued to redeem the property. The mortgagee resisted the suit on the ground that Nathaniel's widow had no right to redeem. The contention was that the property was the joint property of Acha's children, that the plaintiff who was no member of the tarwad had no right to redeem and that the right vested in the surviving children of Salome and Lydia. Having regard to the fact that after Chandan's death some

1. (1913) I. L. R. 40 Cal 407.

2. (1912) M. W. N. p. 886.

years before the suit all the members of the family were Christians the only law to be applied was the Succession Act. The case was not one of a conflict between a converted member of the tarwad and the other members who remained Hindus. The observations as to the conversion of a member making him into a tenant-in-common were obiter and with all respect I fail to see why the converted member of the tarwad should be enabled to give to the tarwad property the character of partibility which it never possessed. Impartibility being the very nature of the estate such right as the parties may have should be worked out, so as not to effect the fundamental character of the property. There is no complete analogy between a Malabar tarwad and the Mitakshara joint family and if the observations of Turner, C. J., and Muthuswami Ayyar, J., in *Kunhamed Hajee v. Kunhamed*¹ which I have already set out are borne in mind I do not think conversion makes the convert a tenant-in-common and even if it did, it further gives him a right to partition on the analogy of a Mitakshara family.

I am of opinion that all that the convert is entitled to is to continue to reside in the house and be maintained as before if the other members are willing or to get separate residence and the maintenance allotted to him if the other members refuse.

It is unnecessary to consider what the effect would be if the convert becomes entitled to the karnavanship. The same difficulty would arise if a karnavan becomes a convert and refuses to ask for partition or give up office or when a hereditary Dharmakartha becomes a convert. The question will turn on whether the office is a right which falls under Act XXI of 1850 and whether community of religion is an essential requisite, eligibility or continuance so as to entitle the other parties to claim supercession or removal. I would dismiss the Second Appeal with costs of defendants nos. 1 to 7 and 11 to 16.

A. V. V.

Second appeal dismissed.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.
[FULL BENCH.]

PRESENT:—SIR JOHN WALLIS, CHIEF JUSTICE, MR. JUSTICE OLDFIELD, MR. JUSTICE SPENCER, MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE RAMESAM.

Arunachalam Chetty and

another

... Appellants * in both. (Plaintiffs)

v.

Periasami Servai and others Respondents in S. A. No. 369 of
1920 (Defendants).

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Limitation Act, IX of 1908 Arts. 11, 13, and 120—Attachment before judgment—Decree in suit order in execution—Order on claim petition filed subsequently—Limitation for a suit questioning the order.

Property attached before judgment is not in all cases attached "in execution of a decree" within the meaning of Art. 11, Limitation Act.

Where there is an order in execution for the sale of property attached before judgment, that order proceeds on the footing that the property is to be considered as attached in execution by virtue of O. 38, R. 11 of the Code of Civil Procedure; a claim put in after that order may properly be regarded as a claim to property attached in execution of a decree within the meaning of Art. 11 of the Limitation Act. The period of limitation for a suit to set aside the claim order is one year under that article.

Cases of claim orders in cases of attachments before judgment not governed by Art. 11 fall under Art. 120 of the Limitation Act.

Second Appeals against the decrees of the Court of the Temporary Subordinate Judge of Sivaganga in Appeal Suits Nos. 36 and 37 of 1919, preferred against the decrees of the Court of the District Munsif of Sivaganga in O. S. Nos. 31 and 33 of 1919.

T. R. Ramachandra Aiyar and N. A. Krishna Aiyar,
for the appellants.

A. V. K. Krishna Menon for the respondents.

The Court (Napier and Krishnan, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

Napier, J.:—The point that arises in this Second Appeal is one of Limitation. The suit is one for a declaration that the plaintiffs are entitled to attach the suit properties and to bring them to sale in execution of a decree. The properties were attached on 9—5—1912 in a suit O. S. No. 122 of 1912 prior to judgment. The plaintiffs endeavoured to bring them

* S. A. Nos. 369 and 370 of 1920.

to sale in execution of the decree passed in that suit, but the defendants put in claim petitions which were allowed. The present suit was filed more than a year after the order in the claim petitions. The Lower Appellate Court held that the suit was barred by Art. 13 of the Limitation Act. Hence this appeal. It has not been contended before us that Art. 13 applies but, it is urged by the Appellants that Art. 120 applies while the respondents rely on Art. 11. Art. 11 is as follows:—

“ * * * on an objection made to the attachment of property attached in execution of a decree.” Clearly the words if strictly applied do not cover the present case, but it can be argued that the descriptive words are only intended to indicate the class of order, and that as such orders are made in claims against attachment before judgment by virtue of O. 38, R. 8 of C. P. C. The article should be read accordingly. Additional force is given to this argument by the provision of O. 38, R. 11 for it is certainly arguable that R. 11 operates to *make* the attachment one in execution of a decree. In Second Appeal No. 194 of 1920 a Bench has decided otherwise, but with respect, I cannot appreciate the reasons of the decision. If the Court had held that neither under the Code of 1877 nor under the present Code could either Art. 11 of the old Limitation Act or Art. 11 of the present Act apply, I could understand that view, but the learned Judges seem to think that where specific sections of the Code are mentioned, as in Art. 11 of the old Act, the application may be made, but where the words “in execution of a decree” are used it cannot be done. With deference the Court overlooks the fact that S. 487 of the Code which applies the procedure of the claim sections is not included among the sections referred to in Art. 11, so that the position under the old Act instead of being stronger seems to me to be weaker, for Ss. 281, 282 and 283 set out in Art. 11 are all ancillary to S. 278 which refers to property attached in execution of a decree. It seems to me easier to give a wide meaning to words, than to include sections not enumerated in the Article. It is curious that there are no reported cases under the old Act or Code on the point, but I am informed by one of my colleagues who has long experience in claim petitions that Art. 11 has always been applied under the old Code to claims in execution in respect of property attached before judgment—doubtless in view of Ss. 487 and 490. I may

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point out that the Full Bench in *Prasada Nayudu v. Virayya*¹ have given an extended meaning to the word "investigated" in O. 38, R. 8, following the policy and intention of the Code rather than the actual words and it may be possible to do so with reference to Art. 11 of the Limitation Act for it has been laid down that the Code and the Limitation Act must be read and construed together. I do not feel prepared to go so far myself in view of the decision above referred to but I think that the question is one which does require an authoritative ruling as early as possible, now that it has been raised. There is of course nothing in principle distinguishing claims in execution proceedings to property attached before judgment from claims to property attached after judgment.

I therefore think it advisable to refer to a Full Bench the following question :—Does Art. 11 of the Limitation Act apply to suits arising out of claim petitions regarding property attached before judgment? If not, does Art. 13 or Art. 120 apply?

Krishnan, J

Krishnan, J. :—The question we have to consider in these cases is what article of the Limitation Act applies to suits by defeated claimants under O. 21, R. 63 to contest orders passed on claim petitions with reference to property attached before judgment. It was recently ruled by a Full Bench in *Prasada Nayudu v. Virayya*¹ overruling the contrary view taken in *Ramanamma v. Bathala Kamaraju*² that Rr. 58 to 63 applied to cases of attachment before judgment also. Now the question is what is the limitation applicable to such suits, a question which was not directly decided by the Full Bench.

The Munsif applied Art. 11 and that is supported by the respondent before us. The Subordinate Judge applied Art. 13 but the appellant argues that neither Art. 11 nor Art. 13 applies but that only the residuary Art. 120 applies. In support of his contention the appellant has referred us to a recent ruling of Oldfield and Seshagiri Ayyar, JJ., in Second Appeal No. 194 of 1920 still unreported and it certainly supports him. That decision however leads to the manifest anomaly of allowing 6 years to a defeated claimant when the attachment is one before judgment whereas in all other cases the one year rule under Art. 11 will apply. No good reason has been shown why such a

1. (1918) I. L. R. 41 Mad. 849.

2. (1917) I. L. R. 41 M. 23.

distinction should have been made by the Legislature ; in fact the learned Judges think that it is a case of oversight made *per incuriam* by Legislature. But before we attribute mistakes to Legislature we must, I think, be fully satisfied that the language of the particular enactment cannot possibly be construed so as to avoid doing so. The learned Chief Justice, has pointed out in his judgment in the Full Bench above referred to, that " the general policy of the law is that questions of title raised by claims against attachments *before* or *after* judgment should be promptly disposed of." In view of this observation and of the anomaly I have pointed out above, I think, with all respect, that the view taken in Second Appeal No. 194 of 1920 should be reconsidered and I agree with my learned brother's proposal to refer the question to the Full Bench to have an authoritative ruling on it. The learned Judges in Second Appeal No. 194 of 1920 consider that the language of Article 11 is altogether inapplicable to cases of property attached before judgment as it speaks of property "attached in execution of a decree." Though this may appear to be so at first sight it seems to me that the effect of O. 38, R 8 as explained by the Full Bench is to bring property attached before judgment within the purview of Rr. 58 to 63 of O. 21 and thus within the expression "property attached in execution of a decree" which is the very expression used in R. 58. The learned Judges concede that Art 11 as it stood under the repealed Act IX of 1877 covered suits referring to property attached before judgment, for that Article expressly referred to orders under Ss. 280 to 282 of the old Code and S. 487 corresponding to O. 38, R. 8 made the order on a claim petition in a case of attachment before judgment one under one of those sections. If this view is correct, as I respectfully think it is, it seems to me easy to hold that the words of Article 11 (1) refer to all orders under Rules 60 to 62 and do not exclude such orders when passed in cases of attachment before judgment. I do not think the change of language was intended to alter the scope of the Article in any way, but was really due to the fact that provisions in Ss. 280 to 282 of the old Code were not enacted in the body of the present Code, but were relegated to the rules which were declared to be subject to alteration by the High Courts in S. 122 of the Code. If the rules were referred to by number in the Article an alteration in the rules by a High Court may introduce a difficulty.

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The use of the compendious expression "property attached in execution of a decree" in Article 11 instead of referring to the Rr. 60 to 62 themselves seems to be intended to avoid this difficulty and not to any intention to alter its scope. I think therefore the words "property attached in execution of a decree" includes property attached before judgment as well. I am therefore inclined to the opinion that Article 11 applies to the present suit and not Article 120, but as the question is referred to the Full Bench I need not come to any decision on it.

I may add that I agree with the view expressed in Second Appeal No. 194 of 1920 that Article 13 is inapplicable for the reasons stated in it and that besides the case referred to in it, *Sivarama v. Subramanya* ¹ the rulings in *Ayyasami v. Samiya* ² and in *Narasimma v. Appalacharlu* ³ are to the same effect.

I agree to the order proposed by my learned brother.

N. A. Krishna Aiyar, for the appellants.

A. V. K. Krishna Menon, for the respondents.

The Court expressed the following

Wallis, C. J.

Opinion :—The Chief Justice:—The scope of the claim proceedings sections has recently been considered by Full Benches of this Court in *Prasada Naidu v. Veerayya* ⁴ *Venkata Ratnam v. Ranganayakamma*, ⁵ and *Ramaswami Chettiar v. Mallappa Reddiar* ⁶. In all these cases it has been pointed out that the object of these sections is to secure the speedy settlement of questions of title raised by attachments, as explained by the Judicial Committee in *Sardhari Lal v. Ambika Pershad*, ⁷ and in the last of these cases attention was drawn to the fact that in claim proceedings the release under R. 60, of the property attached or the disallowance under R. 61 of the claim are made to depend not on title but on possession at the date of attachment, the question of title being left to be investigated in the suit which the unsuccessful party is bound to bring within the prescribed period on pain of losing all his rights. It is by this suit or the failure to institute it that the speedy settlement of the questions of title is secured and all that the order on the claim petition does beyond raising or confirming the attachment is to decide which party is to sue on pain of losing his rights.

1. (1885) I. L. R. 9 Mad. 57.

2. (1884) I. L. R. 8 Mad. 82.

3. (1888) I. L. R. 12 Mad. 294.

4. (1918) I.L.R. 41 Mad. 849 : 35 M.L.J. 281 (F. B.)

5. (1918) I.L. R. 41 Mad. 985 : 35 M.L.J. 385.

6. (1920) I L. R. 48 Mad. 760.

7. (1888) I. L. R. 15 Cal. 521 (P. C.).

S. 246 of the Code of 1859 expressly provided as regards attachments before and after decree that the suit was to be brought within the short period of one year, and this did not cease to be any the less a cardinal and most essential feature of this procedure when in the supposed interests of uniformity the period of one year was omitted from the Code and transferred to the Limitation Act of 1871. It is not disputed that the period of one year continued to be prescribed by the Limitation Acts of 1871 and 1877 and the suggestion that in the Limitation Act of 1908 the Legislature consciously intended to make an alteration as regards orders on claims as to attachments before decree and to allow the unsuccessful party six years to sue under article 120 instead of one year under Art. 11 is *prima facie* most unlikely seeing that the effect of the alteration is to defeat what has always been the essential feature of this procedure, the speedy settlement of titles. It is also clear that the occasion of the change made in 1908 in the terms of article 11 was the repeal of the sections of the old Code referred to in the article as it stood in the Act of 1877 and that no argument in favour of an intended alteration in the substance of the article can be based on the fact that the Legislature did not merely substitute for the repealed sections a reference to the corresponding rules of O. 21 of the new Code, as it was a sufficient reason for not adopting that course that under the new Code numbering of the rules as well as the rules themselves are made subject to alteration by each of the High Courts in the exercise of its rule-making power. There is therefore no apparent reason to suppose that the Legislature intended to alter the law so as in the case of the claims arising out of attachments before judgment to give the unsuccessful party six years in which to sue; and, as attachment is the first step in execution and the effect of the provisions as regards attachment before judgment is in exceptional cases to allow that step to be taken without waiting for the decree. I was at first disposed to think that even an attachment before judgment might be regarded as an attachment "in execution of a decree" within the meaning of the new article, seeing that it is a step taken purely for purposes of execution and that we should best give effect to the real intention of the Legislature by so holding. On a further consideration of the subject I think that such a construction is inadmissible in view of the fact that S. 246 of the Code of 1859 referred to property "which may"

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have been attached in execution of a decree or under any order for attachment passed before judgment and that S. 86, which has been re-produced in the subsequent Codes and now appears as O. 38, R. 8 provided that claims to property attached before judgment should be investigated in the same manner as claims to property attached in execution of a decree. As it is well-settled that the Limitation Act and the Code are to be read together, I have reluctantly come to the conclusion that we should not be justified in laying down generally that property attached before judgment is attached "in execution of a decree" within the meaning of the present Article 11.

It then becomes necessary to consider cases in which the claim to property attached before judgment is put in after decree, or even, as in the present case, after sale has been ordered in execution. As already observed, an attachment before Judgment in default of security being given is always a step taken with a view to execution; it has the same effect as an attachment after decree which is the first order to be obtained in execution; and like such an attachment enures until further orders of the Court. (See Sch. 1 App. F No. 7 and App. E No. 8). O. 21, R. 57 deals with property "under attachment in execution of a decree," but throws no light on the present question, as it merely provides for the dismissal for default of an application for execution and for the attachment ceasing on such dismissal. O. 38, R. 11 is more in point, and provides in effect that, when an attachment before Judgment continues in force after a decree for the plaintiff, it shall not be necessary on an application for execution to apply for a re-attachment. This provision does not in my opinion enable us to say that property attached before Judgment becomes property attached in execution of a decree upon the mere passing of a decree for the plaintiff, either within the meaning of Art. 11 of the Limitation Act or of O. 21, R. 57 already mentioned, as execution may never be applied for, but merely enables the decree-holder to apply for execution by sale of the attached property without a fresh attachment. Where, however, as in the present case, there is an order in execution for the sale of the attached property, that order appears to me to proceed upon the footing that the property is to be considered as attached in execution by virtue of R. 11 and I think a claim put in after that order may properly be regarded as a claim to

property attached in execution of a decree within the meaning of Art. 11 and would answer the reference accordingly merely adding cases not governed by Art. 11 must be governed by Art. 120, as it has not been seriously argued that Art. 13 is applicable.

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Even so, the result of the changes introduced in the Limitation Act of 1908 is to leave the law on this subject in a very unsatisfactory state. The whole object of the summary claim procedure is frustrated when a period of six years is allowed under Art. 120 for questioning an order on a claim petition, and I think that the matter should be set right by the Legislature at the earliest opportunity.

Oldfield, J. :—I agree.

Oldfield, J.

Spencer, J. :—The whole object and aim of attachments before judgment is to prevent property being put out of the reach of creditors in the interval which must elapse between such attachment and the passing of a decree. As observed by the Privy Council in *Motulal v. Karrabulddin*¹ "Attachment only prevents alienation, it does not confer title."

Spencer, J.

I conceive that it was with this object in view that S. 64 of the Code of Civil Procedure (corresponding to S. 276 of the Code of 1882) was enacted, making any private transfer or delivery of the property attached void as against all claims enforceable under the attachment. The section only restricts transfers being made by or in favour of defendants. Attachment ceases automatically upon the connected petition being dismissed. (See O. 21, R. 57.)

When property is attached before judgment, there is no disturbance at this stage of the possession of persons other than the debtor—defendant for, O. 38, R. 7 declares that attachment is to be made in the manner provided for the attachment of property in execution of a decree, which means that the person in possession of immoveable property attached other than the judgment-debtor is prohibited under O. 21, R. 46 from giving it over to the judgment debtor (who may be termed the debtor-defendant before the decree is passed) and that the debtor-defendant, if the property is immoveable, is prohibited under O. 21, R. 54 from transferring or charging the

1. I. L. R. 25 Cal. 179 at page 185.

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property, and other persons are prohibited from benefiting by any such transfer or charge.

There is no occasion then for third parties to object to attachments made before judgment as they create no rights and disturb no third party's possession. O. 38, R. 10 expressly saves the rights existing prior to the attachment, of persons who are not parties to the suit. They are not prohibited from making transfers between themselves. If, as the result of the trial, the suit is dismissed, the attachment has by the provision in O. 38, R. 9 to be forthwith withdrawn. If on the other hand, a decree is passed and an attempt is made to execute it, what was an attachment before judgment becomes in effect an attachment in execution of a decree, because O. 38, R. 11 declares that no re-attachment is necessary. As attachment is the first step in the execution of all decrees against property, just as sale or delivery of property is the last step, the effect of this provision is that execution is made to date back to the first attachment which was before judgment.

Rule 8 which directs that investigation into claims preferred to property attached before judgment shall be made in the same manner as if it was attached after judgment is another indication that for all purposes an attachment before judgment was intended to be treated as if it was made after judgment.

In C. M. S. A. No. 21 of 1920 Abdur Rahim and Sadasiva Aiyar, JJ. held that a claim to property attached before judgment was a matter arising in execution of a decree falling under S. 47 of the Civil Procedure Code.

In the appeals before us the claims preferred by the 1st defendant in each suit were put in after the properties were brought to sale in the execution proceedings. I find no difficulty in classing such a claim under the heading "Of a claim preferred to * * * property attached in execution of a decree", which are the words of Art. 11 of the 1st Schedule, Indian Limitation Act. At the time when the claim was made, there was a decree, the decree was being executed, and the property had been attached in a manner which the law declares to be sufficient.

As the suits which were subsequently filed to establish rights denied to the plaintiffs by the orders passed on the claim petitions were not instituted within one year of the date of the orders

they were rightly dismissed. An instance of an objection being raised to attachment or a claim being preferred before the passing of a decree and the commencement of execution proceedings has not occurred in the present case, and as I have endeavoured to show, is not likely to occur in other cases. No opinion need be expressed on hypothetical cases. The first question referred to the Full Bench may be answered in the affirmative and the alternative question in the negative.

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To remove the doubts that have arisen I concede that it is desirable that article 11 should be made clearer by adding the words "before judgment or" between the words "property" and "in execution of a decree",

Kumaraswami Sastri, J. :—I agree.

Ramesam, J. :—I agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE AYLING AND MR. JUSTICE SPENCER.

Munishi China Dandasi

∴ *Appellant.**

v.

Munishi Pedda Tatiah

∴ *Respondant.*

Civil Procedure Code, S. 41—Question relating to execution—Defence to a suit for possession by auction purchaser—Infructuous application to set aside sale—Effect of

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In a suit for possession by a purchaser at a sale in execution of a mortgage decree, it is open to the defendant to plead by way of defence that the properties sought to be recovered were not included in the mortgage suit or decree but were fraudulently inserted in the sale certificate

The mere fact that the defendant unsuccessfully applied under O. 21, Rr. 89 and 90, C. P. Code, to set aside the execution sale, does not operate as *res judicata* in the absence of any adjudication on the merits of his case in the execution proceedings. *Venkataramanachariar v. Meenalochi Sundaramier* (1) followed. *Tathu Naick v. Kondu Reddu* (2) Referred to.

Second appeal against the decree of the District Court of Ganjam at Berhampore in A. S. No. 15 of 1919, preferred against the decree of the Court of the Principal District Munsif of Berhampore in O. S. No. 528 of 1917.

Mr. B. Sitarama Row for appellant.

Mr. B. Jagannadha Doss for respondent.

* S. A. No. 588 of 1920,

1st, 2nd and 14th Dec. 1920.

f. (1908) I. L. R. 19 M. L. J. 1.

2. (1909) I. L. R. 32 M. 242.

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—
Spencer, J.

The Court delivered the following

Judgments :—*Spencer, J.* :—The appellant, who is the plaintiff in the suit, purchased certain lands in a court sale upon a mortgage decree. He alleged in the plaint that he obtained delivery of this property through Court but that he was dispossessed a month later by the defendant. He now sues to recover possession of the property from the mortgagor (defendant) and for an injunction against further interference by the latter.

The suit was dismissed in the first Court on the ground that the sale was invalid, and on appeal the District Judge confirmed the District Munsif's decree. It was also found that the plaintiff had not obtained possession of the lands in suit and that his allegation of trespass was untrue. In second appeal it is contended that the defendant is debarred by *res judicata* from questioning the correctness of the sale and also that he is debarred under S. 47, C. P. C., from raising a question relating to execution in this suit.

It appears that after the sale took place the defendant appealed under O. 21, R. 89 to have the sale set aside on making a deposit as required by that rule, and that he was unsuccessful in that application. Afterwards he applied under R. 90 of the same Order to have the sale set aside on account of irregularity and fraud, and upon this the order of the executing Court was that his application was too late. The defendant's contention is that the lands described in the sale certificate given to the auction purchaser (plaintiff) are not either included in the mortgage or in the decree passed in the mortgage suit, and that this is so, has not been seriously disputed. The appellant's pleader urged that the defendant having once applied to have the sale set aside and having failed was bound by *res judicata* from raising the contention that the sale was invalid even though his application was dismissed upon the ground that he was out of time without a determination of the question relating to the validity of the sale. He has however failed to show us how this case comes within the rule of *res judicata* as defined in S. 11, C. P. C. It is quite clear that there was no adjudication upon the substantial question raised in the defendant's petition as to the validity of the sale and therefore it cannot be deemed to have been a matter directly and substantially in issue in any prior proceedings.

As regards the contention that S. 47, C. P. C., is a bar to the defendant's plea in this suit the respondent's pleader has brought to our notice the case of *Venkatarama Chariar v. Meenatchi Sundaramaiyar* ¹ which is a direct authority both on this point and on the point of *res judicata*. That was a similar case to this in which certain lands were sold under a mortgage decree and a sale-certificate was given in respect of other lands not included in the mortgage or in the decree. The plaintiff having contended that it was not open to the defendant to raise the defence that certain items of property mentioned in the sale certificate were not in fact compromised in the mortgage or in the decree the Chief Justice Sir Arnold White, and Davies, J. observed that the effect of S. 244 was to debar the plaintiff from bringing a suit for the determination of a question relating to the execution, discharge or satisfaction of a decree which had arisen between himself and the defendant as parties to the suit, in which the decree was obtained, but not to debar the defendant from setting up by way of defence a matter which related to the execution, discharge or satisfaction of a decree obtained in a suit to which he and the plaintiff were parties. In support of this view they quoted two cases of the Calcutta High Court *Bikram Ali Shaik v. Gopi Kanth Shaha* ² and *Nilkamal Mukerjee v. Jahnnabi Chowdhurani* ³ in which a similar view was taken in respect of S. 244 corresponding to S. 47 of the present Procedure Code. Again in *Thathu Naick v. Kondu Reddi* ⁴ two learned Judges of this court out of three, held that a sale could be impeached in case of fraud discovered after the confirmation of the sale and that the defendant could raise this contention by way of answer to the plaintiff's claim upon the strength of the sale in his favour. The only exception which in Sankaran Nair, J.'s opinion might arise would be if the defendant was estopped or otherwise barred by any rule of law from putting forward his claim.

Now on the facts of the present case the appellant's pleader has not shown that any estoppel arises or that the defendant is barred by any rule of law. He relied on two decisions to which I was a party. One is that in *Annabatula Venkataratnam v. Annabattula Nayudu* ⁵ and the other is in *Venkatachalapathy*

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China
Dandasi
v.
Munishi
Pedda
Tatiah.

Spencer, J.

1, (1908) 19 M. L. J. 1.

2. (1897) I. L. R. 24 Cal. 355.

3. (1890) I. L. R. 26 Cal. 946.

4. (1909) I. L. R. 32 Mad. 242.

5. (1915) 28 I. C. 506.

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China
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Tatiab.

Spencer, J.

Aiyar v. Perumal Aiyar ¹. In the former case what was decided was that an order passed in execution by which both parties were bound, refusing to recognise an assignment of a decree, which had not been appealed against could not be challenged in a subsequent suit. It is not a decision on the point whether a defendant can put forward a plea in answer to a suit when if he were in the position of the plaintiff he would be debarred from suing on the ground that that plea involved a matter relating to the execution, discharge or satisfaction of the decree. In the Madras Weekly Notes case an order was made for sale in execution of a mortgage decree directing the first defendant's rights in his own property to be sold and they were sold accordingly. The order was made apparently under S. 87 of the Transfer of Property Act. The judgment states that the question in that suit was as to the construction of the decree passed, in favour of the sub-mortgagee. It was held that the plaintiff was entitled to enforce the rights obtained under the sale as the defendants had not taken steps to set it aside. It also appears that in that case the defendants were bound by the order passed against them under S. 89 of the Transfer of Property Act. In the present case the circumstances are different. Here the sale-certificate was in contravention of the decree and of the terms of the mortgage as it included properties not covered by the mortgage or the decree. The defendant pleads fraud in drawing up the sale certificates and the Lower Courts have found that this plea is good. Defendant does not now ask to have the sale set aside and there is no provision of law requiring him to get the sale set aside on the grounds of material irregularity before allowing him to plead fraud in answer to the plaintiff's claim for possession of property of which he, the defendant, is the present possessor. The second appeal therefore fails and is dismissed with costs.

Ayling J.

Ayling, J.:—I agree. The ruling in *Bhiran Ali Shaik v. Gopi Kanth Shaha* ² and *Nil Kamal Mukerjee v. Jahnabi Chowdhurani* ³ followed and approved in *Venkatramachariar v. Meenatchi Sundaramaiyer* ⁴ clearly lay down that the defence set up in this case is maintainable and although they seem to have the result of making the finality of the sale depend on whether the auction purchaser gets possession or not, I am not

1. (1912) M W N page 44

3. (1899) I L. R. 26 Cal. 946.

2. (1197) I. L. R. 24 Cal 355.

4. (1908) 19 M. L. J. 1.

prepared to dissent from them. The judgment in *Nadamuni Narayana Iyengar v. Vccrabadra Pillai* ¹ tends the other way, but in that case the suit was brought by the judgment-debtor against the auction purchaser and the cases above referred to were not considered.

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China
Dandas,
v.
Munishi,
Pedda
Tatiah.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE ODGERS.

Thacharakavil Manavikraman ... Appellant * (Plaintiff.)
Tirumalpad Raja Avergal.

v.

Noor Mahomed Sait ... Respondent (1st Defendant.)

Transfer of Property Act, Ss. 108 (h) and 111—Forfeiture—Expression of intention to determine the lease—Time for removal of buildings erected by tenant—Power of Court to grant,

Thachara-
kavil
Mana-
vikraman
v.
Noor
Mahomed
Sait.

A notice given by the landlord to his tenant unequivocally expressing his intention to determine the lease on the ground of forfeiture, is a sufficient compliance with S. 111 of the Transfer of Property Act. *Sivarama Iyer v. Alagappa Chetty*, 2. Referred to.

Seemle : In a proper case, a tenant may be allowed a reasonable time after the expiry of the tenancy for the removal of buildings erected by him.

Second Appeal against the decree of the court of the Subordinate Judge of the Nilgiris at Ootacamund in A. S. No. 2 of 1920, preferred against the decree of the court of the District Munsif of Gudalur in O. S. No. 8 of 1918.

T. S. Narayana Iyer for appellant.

Respondent not represented.

The Court delivered the following

Judgment :—The Subordinate Judge has dismissed plaintiff's suit to recover possession of lands leased to 1st defendant on the ground that the notice given by plaintiff was not an adequate notice under S. 106 of the Transfer of Property Act. The learned Subordinate Judge has, however, omitted all consideration of S. 111, Transfer of Property Act, and it appears to us that the notice Ex. B was a sufficient compliance with that section. Vide *Sivarama Iyer v. Alagappa Chetty* ². By

* S. A. No 2057 of 1920.

22nd April 1921.

¹ (1910) I. L. R. 34 Mad. 417.

² (1915) 2 L. W. 946.

Thachara-
kavil
Māna-
vikraman.
v.
Noor
Mahomed
Sait,

that notice he unequivocally expressed the intention to determine the lease on the ground of forfeiture. On this ground he is entitled to a decree for possession. It is further argued that plaintiff need pay no compensation and that 1st defendant is not entitled to remove his buildings after the expiry of the tenancy. The terms of the tenancy comprised in Exs. A and I expressly preclude all compensation, for 1st defendant agreed that none should be claimed. The Subordinate Judge has found that 1st defendant would be entitled to remove his buildings within a reasonable time and we are inclined to agree with him in the special circumstances of this case. There has been some difference of opinion in this Court as to whether S. 108 (h) of the Transfer of Property Act is exhaustive or merely enabling. In *Angammal v. Aslami Sahib* ¹ two Judges were of one opinion and two of another, but in a more recent case (Full Bench) reported in *Thavasi Aminal v. Arumuga Nattar* ² four Judges were of opinion that in that case the tenants should be allowed a reasonable time (6 months) within which to remove the superstructure but the question was not fully discussed. The facts in that case were not entirely similar, but we are prepared to apply the decision here on equitable grounds, more especially as it is in accordance with the judgment of the lower Appellate Court. We would otherwise have referred this to a Full Bench for an authoritative interpretation of S. 108 (h) were it not also that the respondent is not represented in this Court.

The result will be that the appeal will be allowed in part, and plaintiff will have a decree for possession of the plaint property and mesne profits and costs as decreed by the Munsif but 1st defendant will be allowed 3 months within which to remove his buildings.

Respondent will pay plaintiff's costs of this Second Appeal.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE ODGERS.

Balagurumurthy Chetty

v.

Ramakrishna Chetty and others ... *Appellant* * (37th defendant.)
... *Respondents* (1st plaintiff and L. Rs. of 2nd plaintiff.)

Balaguru-
murthy
Chetty
v.
Ramakrishna
Chetty
and others.

Transfer of Property Act, S. 55 (2)—Transfer of a mortgage debt—Covenant for title—Breach—Damages—Contract to contrary.

In a transfer of a mortgage debt there is an implied covenant for title under S. 55 (2) of the Transfer of Property Act. If the debt is found to be fictitious, the transferee can sue the transferor for damages for breach of the covenant for title. *Samu Pathan v. Chidambara Udayan* (1) *Dissented from.*

Perumal Ammal v. Perumal Nayakar (2) *Relied on.*

A specific covenant, to oust the implied covenant for title contained in S. 55 (2) of the T. P. Act, must relate to the same subject matter as that referred to in the implied covenant. *Muhammed Ali Sheriff v. Venkatapathy Raju* (3) *Referred to.*

Second Appeal against the decree of the court of the Temporary Subordinate judge of Madura in A. S. No. 21 of 1918, presented against the decree of the Court of the Additional District Munsif of Dindugal in O. S. No. 286 of 1915.

C. V. Anantha Krishna Aiyar for the appellant.

A. Krishnaswami Aiyar and K. Aravanunda Aiyangar for the Respondent.

The Court delivered the following

Judgment :—Plaintiff, the transferee of a mortgage executed in favour of 37th defendant-appellant has obtained a decree against his transferor alone, it having been found that the mortgage itself is invalid for want of consideration. The contention for appellant (37th defendant) is that the transfer of a mortgage is not a sale of immoveable property within the meaning of S. 55, Transfer of Property Act, and reliance is placed on *Samu Pathan v. Chidambara Udayan* ¹. No doubt in that case the learned Judge, held that though it might be necessary to observe the formalities prescribed in S. 54 in transferring a mortgage, yet such transfer did not attract the provisions of S. 55. In order to make S. 54 applicable the transfer must be deemed to be a sale of immoveable property, and with

* S. A. 603 of 1920.

12th April 1921.

1. (1915) 29 M. L. J. 464.

2. (1920) I. L. R. 44 M. 196.

3. (1920) 39 M. L. J. 449.

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muriy
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Chetty
and others.

respect, we are unable to see why it should not be treated as such a sale within the meaning of S. 55 also. In a recent case reported in *Perumal Ammal v. Perumal Naicker*,¹ a Bench of this Court has held that the transfer of a mortgage by gift is a gift of immoveable property within the meaning of S. 123, Transfer of Property Act, and with the reasoning of that judgment we fully agree, and for the same reasons, hold that a transfer by sale is a sale of immoveable property within the meaning of S. 55. That being so, under S. 55 (2), the 37th defendant impliedly covenanted that the mortgage debt existed and he is liable in damages for the breach of that covenant.

It is next argued that this implied covenant is ousted by the specific covenant to make good to plaintiff any sums received by 37th defendant towards discharge of the mortgage debt and acknowledged under his signature. The principle that a specific covenant ousts an implied covenant is contained in this country in the words "in the absence of a contract to the contrary" which appear in S. 55. It is evident that the specific covenant must relate to the same subject matter as that referred to in the implied covenant, *vide, Mahomed Ali Sheriff v. Venkatapathy Raju*² and *Ragavaiyengar v. Samachariar*³ and that is not the case here, for the covenant to make good monies received towards the mortgage debt itself implies the existence of a mortgage debt and is in no way inconsistent with the covenant that such a debt exists and is certainly not a contract to the contrary.

In any event we think 37th defendant would be liable on the footing of failure of consideration in the contract to transfer the debt.

We therefore hold that the Subordinate Judge's decree is right and dismiss this Second Appeal with costs.

A. V. V.

Second appeal dismissed.

1, (1920) I. L. R. 44 M. 196 : 40 M. L. J. 25.

2, (1920) 39 M. L. J. 449.

3. (1913) 1 L. W. 8.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR JOHN WALLIS, CHIEF JUSTICE AND MR. JUSTICE KRISHNAN.

Arthur Malcolm Lloyd ... *Appellant* * (*Respdt.*)

v.

Kathleen Lloyd ... *Respondent* (*Petitioner.*)*Indian Divorce Act, S 37—Divorce—Decree for dissolution of marriage—Confirmation—Order for payment of alimony, when to be made.*Arthur
Malcolm
Lloyd
v.
Kathleen
Lloyd.

S. 37 of the Indian Divorce Act does not confer on the judge an unfettered discretion as to the time within which he would make an order for payment of alimony to the divorced wife. The order for payment of alimony must be made "at" or "within a reasonable time after" the confirmation of a decree declaring the dissolution of a marriage. *Held*, therefore, that 15 years after the decree absolute was made was not a reasonable time within which to apply for alimony and that the application must accordingly be refused.

Scott v. Scott (1) followed.

Original Side Appeal against the order and Judgment of Mr. Justice Kumaraswami Sastri in the exercise of the Original Matrimonial Jurisdiction of the High Court in O. M. S. No. 6 of 1904.

Messrs. King and Partridge for the appellant.*Messrs. Brightwell and Moresby* for the respondent.

The Court delivered the following

Judgment :—This is an appeal from a judgment of Mr. Justice Kumaraswami Sastri granting the petitioner, the divorced wife of the respondent, alimony at the rate of Rs. 150 a month. The decree absolute was made on the 15th August 1905. The present application is made under S. 37 of the Indian Divorce Act which empowers the court on confirmation of any decree declaring a marriage to be dissolved to make an order for the payment of alimony. That section corresponded to S. 32 of the Matrimonial Causes Act of 1855 which has now been replaced by S. I (1) of the Matrimonial Causes Act of 1907. Both these Acts also contain similar language authorising an order of alimony to be made on any decree for dissolution or nullity of marriage. Now, much learned argument was addressed to us as to the meaning to be put upon the words "on confirmation". It was objected for the appellant that an order made 15 years after the decree for divorce had been made absolute could not possibly be regarded as made on confirmation of

* O. S. Appeal No. 14 of 1921.

10th May, 1921.

1. (1921) P. 107.

Arthur
Malcolm
Lloyd
v
Kathleen
Lloyd.

the decree. It is unnecessary to do more than to say that the April number of 1921, Probate Division, Page 107, has brought out a decision, *Scott v. Scott*¹ on this very question. In that case an order for payment of alimony *pendente lite* had been made which of course ceased to operate on the making of the decree absolute. Payments had been continued for some time under some alleged agreement and seven years after, an application was made to the court under what is now the corresponding section of the Act of 1907. The learned President, Sir Henry Duke conceived that he had a discretion which enabled him to make the order but that decision was overruled by the Court of Appeal in judgments which are equally applicable to the facts of the present case. Lord Sterndale said, "The first question is, what is the meaning of 'on any decree for dissolution'?" I was inclined at one time to think that it meant at the same time as the decree was made, or as it could not precede it, at any rate immediately following upon it. Looking however at the decision of Sir James Hannen in *Bradley v. Bradley*² and *Sidney v. Sidney*³ in the House of Lords which he follows, and also *Robertson v. Robertson*⁴, it seems to me that what Sir James Hannen calls a more elastic meaning must be given to the word "on" and that it does not mean "on" in the very narrow sense that I first thought it ought to be taken to mean, but that it must at any rate be limited to this extent—namely, it must be at the same time as the decree or within a reasonable time afterwards and that what constitutes a 'reasonable time' must no doubt depend on all the circumstances of the case. It appears to me that the learned President has not quite taken that view. He has, I think, taken it as meaning at the same time as or immediately after or within such time as the judge in his discretion may think the petition may be presented. That in my opinion is too wide. What constitutes "a reasonable time" is, I know, not very easy to define; but we have some guide, although I do not think it does lay down an absolute hard-and-fast rule, in what was said by Jessel M. R. in *Robertson v. Robertson*⁴. He said: "In the first place, it appears that there is no instance of an application of this nature being made at so late a period as the present ap-

1. (1921) P. 107.

2. (1878) 3 P. D. 47.

3. (1897) 86 L. J. (P. & M.) 783.

4. (1883) 8 P. D. 94.

5. (1883) 8 P. D. 94, 96.

plication. Whatever meaning may be given to the word 'on' in the Act of Parliament, it is very difficult to extend it to above a year. It is not necessary to express an opinion as to what time should be allowed, but it is not to be conceived that a period of more than a year can be included in the word 'on'. 'On' if not confined to the time of making the decree must mean shortly after." In that case the time was eighteen months, but as the decision of the court went in agreement with that of the learned President on the merits of the application and not really on the question of time, I do not think that statement ought to be taken as a decision as to the absolute limit. It does however point in the direction I have already indicated—namely that the word 'on' does not mean an unlimited time within the judge's discretion, but it does mean within a reasonable time having regard to all the circumstances of the case. That to my mind reduces this case to a very short question: Is the fact of the agreement or arrangement, whatever it may be called, having been made between the parties a circumstance that extends the reasonable time in this case to seven years? In my opinion it is not. It may be that parties were not quite clear as to the actual effect of the agreement or arrangement they had made. It may be that they or their advisers were under the impression that an order had been obtained for the payment of this money. I do not think either of these circumstances is one that justifies the postponement of the application for an order for maintenance for this period." Warrington, L. J. agreed and Scrutton L. J. (at page 125) referred to some other authorities on the meaning of the word 'on'. He says, "Lord Denman C. J. in *Reg v. Arkwright*¹ says. 'The words "on" or "upon" (it has been decided) may either mean before the act done to which it relates, or simultaneously with the act done, or after the act done, according as reason and good sense require, with reference to the context and the subject matter of the enactment.' A series of cases on various branches of the law have been decided in which the word 'on' has been given one or other of those meanings. Lord Denman does not say, as he might have said, "I think it means all three." Then the learned Judge goes on to say "But although the order may be made after the decree for dissolution or nullity of marriage there still arises the question, is there any limit of

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Lloyd,

1. (1846) 12 Q. B. 960, 970.

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Lloyd.

time within which it may be made? Can the wife come and say "I am going presently to present a petition for dissolution of marriage and in the meanwhile I make an application for permanent maintenance in case I succeed?" Obviously not; that would clearly be made an unreasonable time before; or can she say "Twenty years ago, your Lordship gave me a decree for dissolution of marriage, now will you make an order for permanent maintenance"—and say nothing more? Again it seems to me equally obviously not. There is some limitation to be implied in the temporary nature of the order for security as to the order or decree for dissolution. In my view that limitation is this, that inasmuch as the matters to be considered are matters which should be in the mind of the judge at the time when he is making the decree for dissolution of marriage, the limitation is that the application should be made within a reasonable time from the decree for dissolution of marriage. As to what period of time that means, one has the guidance of Jessel M. R.'s views in *Robertson v. Robertson*¹ to which we were referred, but at the time when that case was decided there was no case in which the power had been exercised more than a year after the decree, and the learned Judge could hardly conceive that a period of more than a year could be included in the word "on". In that particular case the time was eighteen months. I see the same limitation has been approved in *In Re Leigh*² where the power of the court was sought to compel a ward of Court to make a settlement 'upon or in contemplation of' the marriage." And the learned judge concludes: "I think in this particular case the application ought to have been made within a reasonable time after the decree for dissolution and I see nothing whatever in the circumstances of this case to justify an application being made seven years after the decree." Everything that has been said in that case by these eminent judges applies to this case and the result is that the appeal must be allowed and the petition dismissed. In the circumstances, we make no order as to costs.

The memorandum of objection is also dismissed.

A. V. V.

Appeal allowed.

1. (1889) 8 P. D. 94, 96.

2. (1888) 40 Ch. D. 290, 295.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SPENCER AND MR. JUSTICE
ODGERS.

Vellaiyammal Bibi and others ... *Appellants (Plaintiffs.)*

v.

Koolayanna Rowthan and others ... *Respondents Defendants 1, 2 and 4).*

Limitation Act, S. 12 (2) and (3)—Time taken in obtaining copy of judgment and decree—Mode of computation.

In computing the period of limitation for filing an appeal under S. 12 of the Limitation Act the time taken in obtaining a copy of the judgment and the time taken in obtaining a copy of the decree must both be excluded except where these two periods overlap each other; and where they do overlap, the time overlapped should be excluded only once.

Silamban Chetty v. Ramanadhan Chetty (1) Raman Chetty v. Kadiroolu (2)
Relied on.

Vellaiy-
ammal Bibi
and others
v.
Koolayanna
Rowthan.

Second Appeal against the Order of the District Court of Coimbatore in I. A. No. 28 of 1920 preferred against the decree of the Court of the District Munsif of Udumalpet in O. S. No. 328 of 1917.

T. M. Krishnaswami Aiyar for appellants.

N. Rama Aiyar for respondents.

The Court delivered the following

Judgment:—The judgment appealed against was delivered on November 3rd and an application for copies of judgment and decree was made on the same date. Copies were ready on December 12th and the appeal was presented on January 12th, *i. e.* the 70th day.

But the appellants were entitled to deduct 27 days in November and 12 days in December which were occupied in obtaining a copy of the decree. Deducting these 39 days, the appeal was presented on the 31st day, but January 11th was a Sunday and therefore under S. 4 Limitation Act, the appeal might be presented on the next working day, and was in time if so presented.

It is argued for the 3rd respondent that the appellants were not entitled to deduct the 14th November seeing that copy stamps for the copy of the decree were called for on November 13th and were not furnished till the 15th.

* S. A. No. 1159 of 1920.

23rd March, 1921.

1. (1909) I. L. R. 33 M. 256

2. (1897) 8 M. L. J. 149.

Vellai-
ammal Bibi
and others
v.
Koolayaana
Kowunan.

But that day (November 14th) has to be excluded under S. 12 (3) of the Limitation Act as one of the days requisite for obtaining a copy of the judgment; and it has been held in *Silamban Chetty v. Ramanadhan Chetty* v. ¹ and *Raman Chetty v. Kadirvelu* ² that a party is entitled to exclude both these periods so long as they are not counted twice over. It is suggested that those decisions are wrong and that the question should be referred to a Full Bench, but we see no reason to decline to follow them and we think that they correctly interpret the intention of the legislature in enacting S. 12 of the Limitation Act, which was that parties should have the benefit of excluding both of these periods under cls. 2 and 3 in computing the period of limitation prescribed for an appeal.

This appeal is allowed with costs. The District Judge will be directed to admit the appeal and dispose of it on its merits.

A. V. V.

Second Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE RAMESAM.

Ramalagu Servai

... *Appellant* * (*Plaintiff*.)

v.

Solai Servai and others

... *Respondents* (*Defendants*).

Ramalagu
Servai

Limitation Act, S. 18, Arts. 62 and 95—Suit for share of a common debt collected by a co-sharer—Limitation—Starting point—Fraud—Extension of time.

v.
Solai Servai.

Where a member of a Hindu family which has become divided collects a debt due to the family and keeps the amount, a suit by the other members for their share of the moneys so collected is governed by Art. 62 and not by Art. 95 of the Limitation Act.

In the absence of proof of active and fraudulent concealment from the plaintiff of his right to institute a suit when it first accrued to him, S. 18 of the Limitation Act will not apply.

Arunachala v. Ramasamy (3) *Vaidyanatha Iyer v. Ayasami Iyer* (4)
Referred to.

Second Appeal against the decree of the Court of the Temporary Subordinate Judge of Madura in Appeal Suit No. 48 of 1919, (A. S. No. 453 of 1918 on the file of the District Court) preferred against the decree of the Court of the additional District Munsiff of Dindigul in Original Suit No. 45 of 1918 (O. S. No. 867 of 1917 on the file of the court of the Principal District Munsiff.)

* S. A. No 646 of 1920.

17th January 1921.

1. (1909) I. L. R. 33 Mad 256.

2. (1897) 8 M. L. J. p. 148.

3. (1883) I. L. R. 6 M. 402.

4. (1908) I. L. R. 32 M. 191.

K. S. Jayarama Aiyar for respondent.

T. L. Venkataramana Aiyar for respondents.

The Court delivered the following

Ramalagu
Servai
v.
Solai Servai.
—
Spencer, J.

Judgments:—*Spencer, J.*:—The Lower Courts were clearly right in applying Article 62 of the Limitation Act to the facts of this case and *Arunachala v. Ramasamy*, ¹ *Vaidynatha Aiyar v. Aiyasami Aiyar* ² *Lakshmi Narasimha v. Lakshmanamma* ³ *Sankunni v. Govinda* ⁴ and *Segu Chidambaramma v. Segu Balayya* ⁵ are authorities for holding that this Article, and not Article 95, applies where one member of a family which has become divided collects a debt due to the family and keeps the amount. The collection having been made on 2nd May 1909 this suit should have been brought before 2nd May 1912 under Article 62.

Reliance is placed on 1st defendants' reply notice Ex C-2 as extending the period of limitation, because the fact of collection was suppressed therein on 11—6—1909.

But the plaintiff's cause of action to sue arose by reason of the 1st defendant having kept back the plaintiff's share when he collected it on 2nd May 1909 and thus time had already begun to run when Exhibits C. and C-2 were exchanged.

It has not been shown that there was any active and fraudulent concealment from the plaintiff of his right to institute a suit at the time when that right first accrued to him.

S. 18 of the Limitation Act will therefore not help the plaintiff to the extent of creating a fresh date for computing the time for instituting this suit.

This Second Appeal fails and is dismissed with costs.

Ramesam, J.—I agree. It is doubtful whether there is any fraud in the case so as to attract the application of Article 95 or S. 18 of the Limitation Act. There has been no misrepresentation by the defendant unless it be that the defendant's not communicating to plaintiff the fact of the receipt of the debt by him amounts to one. But as there is no finding as to relationship of any kind between the parties there is no duty to communicate (*Vide Arunachala v. Ramasamy* ¹ and *Vaidyanatha Aiyar v. Aiyasami Iyer* ² which imply this.) If it is said that a duty arose at the time when exhibit C 2 was sent, I think

Ramesam, J.

1. (1888) I L. R. 6 Mad. 404

2 (1908) I. L. R. 32 Mad. 191.

3. (1912) 25 M. L. J. 581.

4. (1912) I, L, R. 37 Mad. 381.

5. (1911) 2 M. W. N. 467; 12 I. C. 704.

Ramalagu
Servai
v.
Solai Servai.
Ramesam, J.

S. 18 of the Limitation Act can not apply to a case under Article 62 where there was no fraud at the date when the payment was made and the cause of action arose, but a subsequent act of fraud was relied on to save limitation. The section is inapplicable to such a case as we are not told how the interest has to be dealt with. *Lakshmi Narasimha v. Lakshimamma*¹ is a case where the fraud was at the date of the partition and therefore not subsequent to the date of the cause of action.

A. V. V.

Second appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS.

Sheik Mohidin Sahib

... *Petitioner (defendant).*

v.

Ramaswami Chetty

... *Respondent (Plaintiff).*

Sheik
Mohidin
Sahib
v.
Ramaswami
Chetty.

Civil Procedure Code, Sch. II paras 15 and 16—Award—Arbitrator obtaining private information regarding merits of the case—When amounts to misconduct.

The mere fact that information regarding the merits of the dispute between the parties was in the first instance privately obtained by one of the arbitrators does not vitiate the award, if as a matter of fact that information was duly communicated to the other arbitrators and they satisfied themselves as to its truth by independent inquiry in the presence of the parties.

Kanhaiyal Lal v. Khairali (2) *Daya Kishen v. Dharam Das* (3) distinguished.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the decree of the District Court of South Arcot dated the 10th February 1919 in C. M. A. No. 6 of 1918 preferred against the Order of the Court of the Additional District Munsif of Villupuram dated the 30th November, 1917 filing the award mentioned in the plaint in O. S. No. 223 of 1917 (O. S. No. 377 of 1917 on the file of the Court of the District Munsif of Tindivanam).

V. Visvanadha Sastri, for Petitioner.

L. A. Govindaraghava Aiyar, for Respondent.

The Court delivered the following.

Judgment :—The question here is whether the Court should interfere in revision to set aside a decree passed in accordance with an award, on the ground, that the arbitration was vitiated by material irregularity in that one of the arbitra-

* C R. P. No 82 of 192.

14th February, 1921.

1. (1912) 25 M L J 531

2. (1918) 49 I. C. 308.

3 4 A L. J. 159,

tors used knowledge obtained privately in coming to his decision as an arbitrator. *Ghulam Khan v. Muhammad Hassan* ¹ is authority for saying that in the case of an award revision would be more objectionable than an appeal. It is therefore the rule that the court proceeds very warily in allowing revision in awards. Two cases were referred to by the vakil for the petitioner-one, *Kanhaya Lal v. Khairati* ² where an arbitrator made private enquiries from a persons unknown, behind the back of one of the parties the plaintiff in the suit. It is there laid down that an arbitrator must come to his decision on evidence taken before both parties or after having given both parties an opportunity of being present at the enquiry and that making of private enquires vitiated the award. The other case is *Daya Kishen v. Dharam Das* ³ where the arbitrator made private and secret enquiries the result of which was not recorded by him. It was held that it was legal misconduct to make private enquiries and make his award on information which he had privately obtained which the parties had not got opportunities of checking.

Sheik
Mohidin
Sahib
v.
Ramaswami
Chetty.
Odgers, J.

In this case the evidence is that one of the panchayatdars used to have dealings with the defendant. He went to his shop and noticed a difference in the accounts of defendant with the plaintiff from the accounts before the panchayat. The panchayatdar (Annusami Chetti) communicated his knowledge to the other panchayatdars, both parties, were present and the panchayat agreed with the opinion which he placed before them. The defendant actually admitted that some of the entries against plaintiff were false and fraudulent as suspected by Annuswami Chetti. Further the other panchayatdars examined the accounts for themselves and there is no reason for thinking that they did not form an independent judgment thereon.

The information of Annuswami Chetti may have been in the first instance privately obtained, but it was communicated to the other panchayatdars in the presence of the parties and they had opportunity of checking the information or of contradicting it. So far from this, the defendant actually admitted the information was correct. This case clearly does not fall within the

1. (1901) I. L. R. 29 Cal. 167.

2. (1918) 49 I. C. 308.

3 4 All. L. J. 159.

principles laid down in the authorities cited, and the Civil Revision Petition must be dismissed with costs.

A. V. V.

Petition Dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR JOHN WALLIS, CHIEF JUSTICE AND MR. JUSTICE KRISHNAN.

The Secretary of State for India
in Council represented by the
Collector of North Arcot

... *Appellant* * (*Defendant.*)

v.

Syed Ahmad Badsha Sahib Bahadur ... *Respondent* (*Plaintiff*)

Mahomedan Law—Succession—Hereditary office—Lineal primogeniture.

Succession to a hereditary office which cannot be enjoyed by several heirs in common is by primogeniture and in the absence of evidence to the contrary, by lineal primogeniture.

Second Appeal against the decree of the Court of the Subordinate Judge of North Arcot in Appeal Suit No. 186 of 1917 preferred against the decree of the District Munsif of Ranipet in Original Suit No. 217 of 1916.

The Government Pleader C. Madhavan Nair, for appellants.

T. Rangachariar, S. Varadachariar and Srirangachariar for respondents.

The Court delivered the following

Judgment:—We are unable to agree with the Subordinate Judge that assuming the office to be hereditary, the plaintiff has proved that he is the lawful successor by hereditary right. As the office cannot be enjoyed by several heirs in common, it follows in our opinion that succession must be by primogeniture, and in the absence of any evidence to the contrary we think that the succession must be by lineal primogeniture, that is, by descent to the eldest son and his son and that a grandson who is the son of an eldest son of the last officeholder is entitled to succeed in preference to a junior son, where the eldest son has predeceased his father, or is incapable of succeeding owing to insanity or any similar reason. The appeal must be allowed and the suit dismissed with costs throughout.

A. V. V.

Second Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR JOHN WALLIS, CHIEF JUSTICE, AND MR. JUSTICE KRISHNAN.

Gogula Venkanna

... *Appellanti* * (*Plaintiff*).

v.

Gogula Narasimham and others ... *Respondents* (*Defendant*).

Hindu Law—Widow's estate—Moveables—Waste—Alienation—Remedy of reversioner—Alienation—Limitation Act, Art. 120

Gogula
Venkanna
v.
Gogula
Narasimham

Where the corpus of an estate inherited by a Hindu widow from her husband consists of moveables and she is guilty of waste and improper alienation, it is open to the reversioner to file a suit praying that the moveable corpus may be reduced into possession and handed over to a receiver appointed in the suit. Subject to any question of limitation, transferees from the widow without consideration may be made to replace any part of the moveable corpus which can be traced to their hands on the equitable principle applied in *Sinclair v. Brougham* 1 which imposes upon people into whose hands the property of other persons has come without consideration the duty of accounting for it and restoring it. The widow herself who is guilty of waste is accountable therefor and is bound to replace the moveable corpus which she has made away with if she is in a position to do so, subject to her right to enjoy the income of the fund replaced.

Art 120 of the Limitation Act is applicable to a suit by the reversioner, for the reliefs aforesaid.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Vizagapatam in O. S. No 14 of 1913.

A. Krishnaswami Aiyar and *E. Vinayak Rao* for appellants.

P. Narayanamurthi, *T. Ramachandra Rao* and *K. Ramamurthi* for respondents.

The Court delivered the following

Judgment :—*The Chief Justice :—*The defendant's appeal from the decree in this suit has already been dismissed. This is an appeal by the plff., the next reversioner, from the decree of the Temporary Subordinate Judge in so far as it refuses to make the widow accountable for wasting the moveable property of the husband which came to her hands and to make her brother, the Second defendant and 3rd defendant, his undivided brother accountable for so much of the corpus of the estate of the husband of the 1st defendant. the last male owner as has come to their hands. In the case of immoveable property the Hindu reversioner has 12 years to sue from the date of the widow's death under Art. 141 of the Limitation Act, and it is therefore unnecessary to claim such reliefs as are sought in the present suit, but, as regards moveables his right to sue is

Wallis, C. J.

* Appeal. 165 of 1918.

12th April. 1921.

1, (1914) A C, 898.

Gogula
Venkanna
v.
Gogula
Narasimham
—
Wallis, C. J.

governed by Art. 120 of the Limitation Act and the question when his right to sue accrues under that Article is in much the same position as it was with regard to immoveable property under the earlier Limitation Act of 1859, under which it was held by Sir Barnes Peacock and the Full Bench of the Calcutta High Court in *Nobin Chunder Chucker Butty's case* ¹ that possession adverse to the widow was also adverse to the reversioner. In that case the question of the reversioner's remedies during the widow's life-time with regard to the moveable corpus of the estate which she was wasting was considered and Sir Barnes Peacock observed, "Reversionary heirs presumptive have a right although they may never succeed to the estate, to prevent the widow from committing waste; and I have no doubt that if a proper case were made out, reversionary heirs would have a sufficient interest, as well as creditors of the ancestor by suit against the widow and the adverse holder, to have the estate reduced into possession, so as to prevent their rights from becoming barred by limitation" and he goes on to say that adverse possession of Government paper or the like would give a cause of action to the heirs, so, too, Jackson, J. observed that a reversioner aggrieved by the fraudulent action of the widow would be entitled to bring his action. On the authority of this case it was held in *Radha Mohan Dhar v. Ram Dad Dey* ² before the enactment of the present Art. 141, that the next reversioners were entitled to have immoveable property of the estate abandoned by the widow reduced into possession and to put a manager in charge of them. This case is authority for the proposition that, as regards the moveable corpus of the estate also, it is open to the reversioners to file a suit praying that such moveable corpus may be so reduced into possession and handed over to a receiver appointed in the suit subject to any question of limitation, and transferees from the widow without consideration may be made to replace any part of the moveable corpus of the estate of the last male owner which can be traced to their hands on the equitable principle recently applied in *Sinclair v. Brougham* ³ which imposes upon people into whose hands the property of other persons has come without consideration the duty of accounting for it and restoring it.

1. 9 W. R. 505 (Ben L R Supp. Vol. 1008.)

2. 3 Ben, L. R. 326.

3. (1914) A. C. 398.

Then as to the widow's own accountability for wasting the moveable corpus of the estate, the authorities are meagre because the remedy against her would rarely be effective, but on principle I see no sufficient reason for refusing to hold her accountable for waste in the sense of making her replace the moveable corpus which she has made away with if she is in a position to do so, allowing her of course to enjoy the income of the fund replaced. She is not a trustee of her deceased husband's estate, or a tenant-in-tail, or for life, or the manager of a joint family, but the owner of a widow's estate with all the peculiar incidents of such ownership. As the owner of such widow's estate she is under a clear duty to abstain from wasting the moveable corpus of the estate just as a tenant-in-tail or for life is bound to abstain from committing waste, and if she commits a breach of that duty I can see no reason why she should be allowed to go free and not be held accountable. The Subordinate Judge has referred to the case of the manager of a joint Hindu family who is only held accountable for the property of the joint family as it exists at the date of partition but this now well established rule is based on practice on the ground that it is always open to the other members to put an end to the management by partition, which can even be enforced in a proper case on behalf of the minor members of the family. Confirming the reliefs, already granted to the plaintiff, we must allow the appeal and set aside so much of the decree as dismissed the plaintiff's claim for an account against the widow and the 2nd and 3rd defendants in the light of the above observations. Costs to abide.

Krishnan, J :—I agree :—

A. V. V.

Appeal allowed Decree modified.

Gogula
Venkanna
v,
Gogula
Narasimham

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE OLDFIELD AND MR. JUSTICE RAMESAM.

T. A. Sesha Iyer ... Appellant * (1st Deft).

v.

S. N. Srinivasa Ayyar and others ... (Respondents Plaintiffs,
2nd defendant and
supplemental respdt.)

T. A. Sesha Iyer v. S. N. Srinivasa Ayyar.
Transfer of Property Act S. 79—Partition deed—Provision that family debts should be discharged by respective sharers as per schedule—Such sharers' properties to be liable on default—Mortgage by one of the sharers of his share after partition—Decree for a family debt against all members—Priority of charge created by a partition deed—Decree debt not paid by other members—Declaration—Construction of document—Charge or mortgage.

The partition deed between the plaintiffs, the 2nd defendant and three other persons, brothers provided that "the common family debts should be discharged by the respective sharers to whom they fell, as per schedule of the document, and that, if any sharer failed to discharge accordingly, such sharer's properties should be liable for such debts and for the losses that might happen to the family". The 2nd defendant not having discharged a debt due by him under the partition deed a decree was obtained against all the brothers by the creditor. The plaintiffs having brought a suit for declaration that under the terms of the partition deed a mortgage right has been created in their favour to the extent of the decree amount and that that right had priority over a hypothecation executed by the 2nd defendant in favour of the first defendant on some of the properties that fell to the share of the second defendant after the partition, held that the plaintiffs were entitled to the declaration claimed even though they had not paid the decree amount to the creditor.

The case is one governed by S. 79 of the Transfer of Property Act and that partition deed creates a mortgage or charge, as is contemplated by S. 79 and when the liability attaches on the payment of the decree debt it is enforceable in accordance with its terms. *Putti Narayanamurtthy Ayyar v. Marimuthu Pillai* (1) and *Abraham Servai v. Raphael Muthirian* (2) distinguished.

The above provision in the partition deed is not one which merely emphasises their personal liability of the sharer to pay the family debts but creates a mortgage or charge upon his property. *Imbichu v. Thottaramboth Aunkoya Haji* (3) followed.

Second Appeal against the decree of the District Court of Coimbatore in Appeal Suit No. 93 of 1919, presented against the decree of the Court of the Principal District Munsif of Coimbatore in Original Suit No. 271 of 1918.

C. V. Ananthakrishna Iyer, for Appellant.

T. M. Krishnasami Iyer and A. V. Visvanatha Sastri for Respondent.

* S. A. No. 437 of 1920.

30th March, 1921.

1. I. L. R. 28 Mad, 322.

2. I. L. R. 39 Mad. 288.

3. (1917) M. W. N. 583.

The Court delivered the following

T. A. Sesha
Iyer
v.
S. N. Sriniva-
sa Ayyar.

Judgment:—The facts of this case are that plaintiffs, the second defendant and three other persons, brothers entered into a partition by means of Ex. A in 1913. The term of Ex. A with which we are concerned provided that “the common family debts should be discharged by the respective sharers to whom they fell, as per schedule of the document, and that, if any sharer failed to discharge accordingly, such sharer’s properties should be liable for such debts and for the losses that might happen to the family.” One of the debts which was assigned to the second defendant in the schedule was the debt due to one Venkatrama Iyer, and Venkatrama Iyer’s assignee has since obtained a decree against the second defendant and the present plaintiffs in O. S. No. 542 of 1915 on the file of the court of the Principal District Munsif of Coimbatore. One term of the decree no doubt was that it should be executed against the plaintiffs only in so far as the decree amount was not realised by proceeding against the first defendant in that suit before the 9th September 1917. That period however had elapsed before the present suit was brought ; and nothing is alleged to turn on that provision. The decree may be taken to be executable against the second defendant and the plaintiffs.

Subsequently in O. S. No. 142 of 1916 on the file of the court of the Subordinate Judge of Coimbatore, the first defendant obtained a decree on an hypothecation given in respect of some of the plaint-mentioned properties by the second defendant after the said partition, and, in execution thereof, he brought the plaint properties to sale. The plaintiffs contend that, when, as evidently will be necessary, they have discharged the amount of the decree in O. S. No. 542 of 1915, which should have been discharged by the second defendant under Ex. A, a charge in their favour will attach to the properties, which the first defendant is bringing to sale for the amount, which they have paid on behalf of the second defendant ; and they have sued for a declaration that, under the terms of Ex. A, a mortgage right has been created in their favour to the extent of the decree amount in O. S. No. 542 of 1915 and that that right is prior to the mortgage right of the first defendant, and also for a declaration that the properties shall be sold subject to the mortgage right existing in favour of the plaintiffs.

T. A. Sesha
Iyer
v.
S. N. Sriniva-
sa Ayyar

The lower courts have given the plaintiffs the declaration asked for. The first ground on which we are asked to reverse their judgments is that the plaintiffs had no cause of action to ask for a declaration at the time, when they brought their suit ; and the second, which is similar to it, is that the courts erred in the use of their discretion to give such declaration. The fact relied on is that the plaintiffs have not yet made any payment and, it is said, may never have to do so and that, till they make some payment, the charge cannot attach. The answer to this seems to us to be that no distinct and comprehensive rule as to the right to a declaration or the exercise of the Court's discretion in granting a declaration can be laid down irrespectively of the circumstances of the particular case. Here the circumstances are that the liability of the plaintiffs was declared jointly with that of the first defendant in the decree of O.S. No. 542 of 1915, that in view of the failure to recover from the first defendant, the plaintiff's liability is not qualified and can at any moment be enforced against them. They may no doubt discharge it. But they will find it difficult to raise money to do so by assigning their charge on the property, and if they want so to raise money they will be greatly assisted by the declaration of the court. It is further material that in the course of the proceedings, by which the first defendant is bringing the property to sale, the plaintiff's did apply to have a reference to their charge included in the sale proclamation. We have not got the papers connected with that application, but it failed ; and there is nothing to show us that the failure was due to any fault of theirs or to anything except the attitude of the first defendant. We can only infer that his attitude then as it is now, was to deny the plaintiff's right and in these circumstances we think that a suit for declaration will lie and that the lower courts used their discretion judicially and properly in granting it, subject of course to the conclusion, which we come to on the remaining objections to their judgments.

The next point is that the plaintiffs have no charge at all now and will not have one, until they have actually made the payment on the second defendant's behalf. The authorities relied on by the first defendant viz., *Putti Narayanamurthy Ayyar v. Marimathu Pitlai* ¹ and *Abraham Servai v. Raphael Muthurian* ² have been rightly distinguished by the lower courts

1. () I. L. R. 26 Mad. 322.

2. () I. L. R. 39 Mad. 288.

because they were cases in which the suit was directly for contribution due on account of a payment, which the plaintiff had actually made. They have nothing to do with the case here, which is for a mere declaration of the plaintiff's right to a charge which will become operative and the amount of which will be ascertained, only when they do make the payment.

T. A. Sesba
Iyer
v.
S. A. Srinj-
vasa Ayyar.

S. 79 of the Transfer of Property Act recognises as legitimate a mortgage made to secure the performance of an engagement in the future, if it expresses the maximum to be secured thereby, and the section provides that a subsequent mortgage of the same property shall, if made with notice of the prior mortgage, be postponed to the prior mortgage in respect of all advances not exceeding the maximum though made or allowed with notice of the subsequent mortgage. This section seems to us to apply in terms to the present case, because the language of the relevant portion of Ex. A, as has already been said, must be construed in the light of the schedule of debts in Ex. A, which was available as a specification of the maximum to be secured. Our attention has no doubt been called to the fact that the liability of each sharer under Exhibit A is described as being for such debts as he fails to discharge and also for "the losses that may happen to the family." Whatever may be the construction to be placed on the last quoted words, in any case there is a sufficient specification, to meet the requirements of S. 79, of the maximum, even if only the debts be taken into consideration. We however do not think that this reference to losses, meaning presumably interest and costs—and that is all the meaning which we need for the purposes of the present case—would impair the adequacy of the specification of the maximum. No question of notice of the covenant in Exhibit A has been raised by the first defendant. We therefore see no reason for holding that this part of Exhibit A is not such a mortgage or charge as is contemplated by S. 79, and will not be, when it attaches, enforceable in accordance with its terms.

The next argument attempted is based on the wording of Ex. A, and is firstly that no charge at all is created, and secondly that, if any charge is created, it is a charge enforceable only by the creditor. The suggestion on the first point is that this is simply a provision for discharge of the family debts

T. A. Seshu-
Iyer
v.
S. A. Sriniva-
sa Ayyar.

by the respective sharers, to whom they have fallen and that, if any sharer fails to discharge, such sharer's property should be liable; that the words in fact simply emphasise the personal liability of the sharer and that no liability is attached directly to his property. We do not think that this is the natural meaning of the provision, occurring as it does in a partition deed, the presumed intention being to secure that after the parties have separated no one of them should make default in discharging his share of the enjoined obligations of the family. Clauses of this kind are not in our experience uncommon and have been construed as for instance in *Imbichi v. Thottaramboth Aunkoya Haji* ¹ in the manner just stated.

The other contention, that the charge created by these words was intended to attach only in favour of the creditor is not supported by anything and is not reconcilable with the intention of the document, as it has been expressed. In any case, even if such a charge were provided directly for the benefit of the creditor, the member of the family, who actually makes the payment to him, would presumably in accordance with the principle of subrogation be entitled to the creditor's remedy.

In order to prevent any possible ambiguity in the decree of the court of the first instance we think that it may be amended by the insertion after the words "to the extent of" of the words "any payment made by plaintiff towards" and after the words "this court" by the insertion of the words "enforceable when and after such payment has been made."

The appeal is allowed to this extent only and the first debt will pay the plaintiff's costs.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE RAMESAM.

Babu Pujari and another ... *Appellant* (Defendants).*
v.

Thukra Gurikara *alias* Kanthu Lak-
kanna ... *Respondent (Plaintiff)*

Civil Procedure Code, S. 9—Claim for temple honours as the first Gurikar of a caste in a village—No duties to be performed—Suit not of a civil nature.

Babu
Pujari
v.
Thukra
Gurikara.

A claim for certain temple honours to be shown to the plff. as the first Gurikar of a certain caste in a village, no duties having to be performed by him, is not a claim of a civil nature; and no suit for the same is maintainable in a civil court.

Sriman Sadagopa v. Kristna Tatachariar (1) *Karuppa v. Kolanthayan* (2) *Sangappa Bin Baslingappa v. Gangappa Bin Niranjappa* (3) *Narayan Vitha Parall v. Krishnaji Sadashur* (4) and *Tholappala Carlu v. Venkatacharulu* (5) and *Vathiar Venkatachariar v. Ponnappa Anjanger*. (6)

Appeal against the order of the Court of the Subordinate Judge of South Kanara in A. S. No. 48 of 1920 (A. S. No. 403 of 1919 on the file of the District Court) preferred against the decree of the court of the District Munsif of Mangalore in O. S. No. 174 of 1918.

B. Sitarama Rao for Appellant.

Ramanath Sujir for Respondent.

The Court delivered the following

Judgment:—It is clear from the allegations in the plaint that this suit is not for the establishment of the Plaintiff's right to any office in a temple.

His claim in the plaint is for certain temple honours to be shown to him as 1st Gurikar of a certain caste in a certain village. It is not alleged that any duties are to be performed by him. The act of worship which it is alleged in paragraphs 3 and 4 of the plaint that the plaintiff and three other Gurikars do on the occasion of the annual jatra cannot be regarded as a duty or obligation arising out of an office. The facts of this case are not distinguishable from those which were the subject of the decisions in *Sriman Sada-*

* A. A. O. No. 248 of 1920.

1. 1 M. H. C. R. 801.

3. I. L. R. 2 Bom. 476.

5. I. L. R. 19 Mad. 62.

8th March, 1921.

2. I. L. R. 7 Mad. 91.

4. I. L. R. 10 Bom. 223.

6. 7 L. W. 614.

Babu
Pujari
v.
Thukra
Gurikara.

gopa v. Krishna Tatachariyar ¹ and *Karuppa v. Kolanthayan* ²
and *Sangappa Bin Baslingappa v. Gangappa Bin Naranjappa* ³
and *Narayan v. Krishnaji* ⁴ and *Tholappala Charlu v. Venkata-
charulu* ⁵ and *Vathiar Venkatachariar v. Ponnappa Aiyangar* ⁶.

• We agree with the District Munsif that the suit as framed is not maintainable in a Civil Court.

We set aside the decree of the Subordinate Judge and restore that of the District Munsif which dismissed the suit with costs. The respondent will bear his own and appellant's costs here and in the Lower Appellate Court.

C. A. S.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :— MR. JUSTICE NAPIER AND MR. JUSTICE KRISHNAN.

The Honourable Raja Rajeswara
Sethupathi *alias* Muthuramalinga
Sethupathi, Raja of Ramnad by
his authorised Dewan S. Tirumalai
Aiyangar

... *Appellant* * (*Plaintiff*.)

v.

Ramanathaswami at Rameswaram by

Trustee V. Venkatasubba Aiyar ... *Respondent* (*Defendant*.)

Raja Rajes-
wara Sethu-
pathi
v.
Ramanatha-
swami.

Civil Procedure Code, S. 11—Lessor and lessee—Decision against lessee, if binding on lessor—Surrender of the term—Arbitration—Award—Decree of court—Resjudicata.

Per Curiam : A judgment in a suit by or against a lessee is not *resjudicata* against the lessor in a subsequent suit by the latter. The lessor could not be said to be a person claiming title under the lessee within the meaning of S. 11 of the Code of Civil Procedure, notwithstanding the fact that the lessee had surrendered his terms to the lessor before its expiry.

Waller v. Yalden (5) dist.

Second Appeal against the decree of the District Court of Ramnad in Appeal Suit No. 141 of 1919, preferred against the decree of the court of the District Munsiff of Paramakudy in Original Suit No. 40 of 1916.

* S. A. No 1888 of 1919.

6th October 1920.

1. 1 M. H. C. R. 301.

2. I. L. R. 7 Mad. 91.

3. I. L. R. 2 Bom. 476.

4. I. L. R. 10 Bom. 283.

5. I. L. R. 19 Mad. 62.

6. 7 L. W. 614.

5. (1902) 2 K. B. 304.

The facts are fully set out in the judgment of Napier, J.

The Hon. The Advocate General for appellant.

T. Rangachariar and *V. N. Venkatavaradachariar* for respondent.

Raja Rajes-
wara Sethu-
pathi
v.
Ramanatha-
swami.

The Court delivered the following

Napier, J.

Judgments :—*Napier, J.* :—This Second Appeal arises out of a suit by the zemindar of Ramnad to recover *theerva* from the trustee of the Rameswaram temple for trees growing on the land attached to the temple. The written statement alleged first that the topes belonging to the temple were devadayam land and that the temple is not liable to any *theerva* in law or by custom ; secondly, that the suit was barred by S. 11, Civil Procedure Code, by virtue of two decrees, one that of the District Court at Madura on appeal in O. S. Nos. 288 and 289 of 1879, the other in O. S. Nos. 571 and 572 of 1903 in the Court of the District Munsiff of Paramakudi. Issues were framed, the third issue being “Whether the plaintiff’s claim is barred by *res judicata* ?” The District Munsif decided against the defendant in respect of both judgments pleaded as *res judicata*, but the lower appellate court has reversed that decision holding that both these decisions operated as *res judicata*. This question now comes before us for decision.

With regard to the judgment and decree of the District Judge of Madura, the lower appellate court is clearly in error. [His Lordship next considers the evidence relating to the plea.]

A far more difficult question arises with regard to the plea of *res judicata* in respect of the award and judgment in O. S. Nos. 571 and 572 of 1903. At the time when this latter suit was brought the trustee of the Devasthanam was himself a lessee of the whole Zemindari. It appears that one Lakshmanan Chetty was a co-lessee. The two lessees brought O. S. Nos. 571 and 572 of 1903 against one of themselves as trustee of the temple in respect of tree tax from the temple. The allegations were that the lessees had tendered proper pattahs for faslies 1309, 1310 and 1311, and the defendant had refused to accept them. Nothing is said about the tree tax in the plaint. In the written statement however the trustee-defendant pleaded that the lessees were not entitled to get the *theerva* imposed on the topes of the Rameswaram Devasthanam. They also pleaded

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that the suit was barred by *res judicata* under S. 13, Civil Procedure Code by virtue of the decisions in Appeals Nos. 243 244 against O. S. Nos. 288 and 289 of 1879. No issues were settled in the case by the court but by consent the whole suit was remitted to arbitration. It is obvious that this was in the nature of a friendly suit, and I have little doubt that the trustee in his position as lessee wished to get a decision which would cover the whole period of his lease which was for twenty years. The following issues were framed by the arbitrator with the consent of the pleaders. "Whether the suits were barred by S. 13 of the Civil Procedure Code by reason of the decrees in A. S. Nos. 243 and 244 of 1880 of the District Court of Madura as alleged by the defendant?" "Whether the defendant is estopped from raising that contention by the conduct of his predecessors in paying tax for the trees till fasli 1310? and whether such payment was due to mistake?" The arbitrator issued an award in which he found that the suits were barred by reason of the decrees in A. S. Nos. 243 and 244 of 1880. I have already shown that this finding is absolutely incorrect. He then proceeded as follows:—"Apart from the question whether Ex. 1 can operate as *res judicata*, it seems to me that the reasoning upon which that decision is based applies equally to the present suits and disentitles the plaintiff to any rent in respect of the plaint mentioned lands and trees standing thereon, forming part of the pagoda Devadayam." The reasoning on which the decision was based is, as I have pointed out already, a contradiction in terms for the decree confirmed the judgment making the defendant trustee liable for the tree tax, and any observation in the judgment cannot affect the decree. Therefore this ground for decision is wrong. But the decision by the arbitrator remains whether it was right or wrong. The award was filed in court, and certain objections were put in, the nature of which appears from the order of the District Munsiff. They were based on the refusal to grant an adjournment and that the decision on the question of law and fact was erroneous. The District Munsiff held that those were matters into which he could not go and concludes his judgment by saying "In pursuance of the award of the arbitrator the suit must stand dismissed." It was not urged by the defendant in the suit that the arbitrator's award by itself operated as *res judicata*, nor was that question argued before us because the written

statement relied on the judgment and the decree of the District Munsiff. But it has been strenuously argued before us that the finding on the issue of *res judicata* is binding by virtue of the judgment and that by virtue of explanation 4 any other plea which could have been raised must also be *res judicata*. We have therefore to see whether S. 11 Civil Procedure Code does or does not apply.

[His Lordship after considering the question at length Concludes thus.] In the result I am of opinion that the plea of *res judicata* by virtue of S. 11 Civil Procedure Code is bad. It might be that in the circumstances of the case the award and the judgment might operate as a judgment by consent and estop the parties to that award-suit, but no such question has been raised in this case or urged before us.

The next question is whether even if the judgment could operate as *res judicata* the plaintiff here would be bound by the judgment and decree in the arbitration. The plaintiff in that suit was a lessee for 20 years ; and it is not contended before us that the decision in that case binds the plaintiff as lessor. What is contended is that as this suit seeks to recover *theerwa* for the years which were covered by the original lease to the lessee in the former suit, the lessor is bound by the decision, he being in possession of the estate by virtue of a surrender from the lessee. This point was not raised before or considered by the lower appellate court. Mr. T. Rangachariar contends that the right established by that decision to freedom from *theerwa* enures for the whole term of the lease although the lease has been surrendered; and he claims that he is entitled to it by analogy with the estoppel provided for in S. 41 of the Transfer of Property Act. He was doubtful whether he could put this claim as high as one arising under the words of S. 11 which are "or between the parties under whom they or any of them claim litigating under the same title." In my opinion his contention clearly cannot be supported, for the plaintiff is not litigating under the same title. In that, he claims as owner whereas the plaintiff in the previous suit claimed as a lessee under him.

Mr. T. Rangachariar suggests however that a surrenderee is in the same position as an assignee, and he relies on the language of the Calcutta High Court in *Raghunath Singh v. William Cox* ¹. The question there was as to the effect of

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¹. (1919) 19 C. W. N. 268.

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surrender by a ryot on the rights of the mortgagee. The Court quoted with approval the language of Channel, J. in *Walter v. Yalden* ¹. In that case it was decided that where a trespasser had acquired against a lessee a title under the statute of limitations, the lessee could not surrender the lease and let in the landlord until the expiration of the term for which the lease was granted. The actual decision does not assist him because, in the English law as well as by the Limitation Act, title is acquired by adverse possession; and such title is for all purposes as good as a conveyance. But he relies on the words used by Channel, J. : "The law is that a lessee can only give title to his lessor by a surrender to the same extent that he could give it to another person by his assignment." I do not think that these words used by the learned judge are to be construed strictly as laying down that a lessor acquires the title of the lessee by surrender. Another case relied on by the learned vakil was *Seshappaya v. Venkataramana Upadya* ². That decided that a mulgeni tenant will not be bound by a decision against his lessor as his interest is not subordinate to that of the lessor, the tenure being a permanent heritable tenure not created subsequent to the decision against his landlord. I do not see how this case helps the defendant. Mr. T. Rangachariar also relies on the language of the Bench in *Suppa Bhattar v. Suppu Sokkaya Bhattar* ³ where the learned judges speak of "a decree of a Court of competent jurisdiction forming a link in the chain of a party's title." I do not think that this case is of any assistance, for the word "title" used in that case has no possible reference to a decision on the mutual rights of the lessor and the lessee under the terms of their contract. Mr. T. Rangachariar relied on a phrase used in Foa's Landlord and Tenant on page 624, "Title by Surrender," but I cannot treat this language as any authority on the point. In Woodfall's Landlord and Tenant surrender is treated as one of the mode of the *termination of the tenancy* and the same principle is applied in S. 111 of the Transfer of Property Act. Sub-section (e) of that section provides that a lease of immovable property determines "by express surrender; that is to say, in case the lessee yields up his interest under the lease to the lessor by mutual agreement between them;" and S. 115

1. (1902) 2 K. B. 304.

2. (1909) I. L. R. 33 Mad. 459.

3. (1915) 29 M. L. J. 558.

provides for the effect of surrender on underleases; but there are no further statutory provisions. The fundamental error in the contention of the learned vakil is that *res judicata* operates on all substantive rights. The result of a decision between parties is at the highest to raise an estoppel between the parties bound by the previous judgment. It in no way affects title *nor* can it operate in the same manner as a covenant.

It was finally argued that the defendant by surrender has been deprived of the benefit of the decision. That may be so but the question of rights between the lessor and the lessee is not concluded by the failure of the plea of *res judicata*, and further if an underlessee desires to bind the ultimate landlord by a decision between himself and his lessor it is perfectly open for him to ask the court to make the landlord a party, in which case the landlord will be bound by the judgment entirely apart from any question of surrender. I am therefore clear that neither under S. 11, Civil Procedure Code as pleaded, nor under the general principle applicable to awards of arbitrators operating as estoppel by consent does this award or judgment bind the plaintiff in the present suit.

In the result the judgment of the Lower Appellate Court must be set aside except as to road cess and railway cess and interest thereon and the case remanded to be disposed of on the other issue framed in the suit. Costs will abide and follow the result. Stamp duty paid by the Appellant will be refunded.

Krishnan, J. :—The only question arising in this case is one of *res judicata*. My learned brother has set out the circumstances in which it arises and I need not repeat them. The issue alleged to be *res judicata* is whether the plaintiff the Rajah of Ramnad is entitled to levy a tax on trees standing on the defendant Devasthanam's lands in the Pamban village in Rameswaram or not. It is contended by the defendant that the Rajah's claim to such tax is barred (1) by the decision in O. S. Nos. 288 and 289 of 1879 and (2) by the decision in O. S. Nos. 571 and 572 of 1903, all on the file of the District Munsif of Paramakudi.

[On the first question His Lordship after considering the evidence agreed with Napier, J., in holding that the plea of *res judicata* based on the decisions in O. S. Nos. 288 and 289 was not established.]

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The next question is whether the decision in O. S. 571 and 572 of 1903 has the effect of making the issue *res judicata* in this case. Here again the facts are fully set out by my learned brother and I will not repeat them. The question has been argued as consisting of two parts, namely, (1) whether when the court has accepted the award of the arbitrator and dismissed the suits in accordance with it did the arbitrator's finding become *res judicata* between the parties to the suits and (2) whether if the parties were barred, does the bar extend to the Rajah who was not a party to those suits?

If either of these questions is answered in the negative this plea of *res judicata* must fall. My learned brother has answered both the questions in the negative but with all respect I am unable to agree with him on the answer to the first question. [His Lordship then discusses the question and comes to the conclusion that the arbitrator's finding was *res judicata* between the parties.]

The question, however, remains whether that finding binds the present plaintiff the Rajah. The plaintiffs in O. S. Nos. 571 and 572 of 1903 were the lessees of the Rajah and not the Rajah himself and it is not contended by Mr. T. Rangachariar that a finding against the lessees will be binding on the lessor even if the lessees had put forward in the trial the lessor's title and *bona fide* endeavoured to support it. In fact a lessor as such cannot be held to be a person claiming under the lessees within the meaning of S. 11, Civil Procedure Code. But Mr. T. Rangachariar argues that we have here a special case inasmuch as the Rajah got his right to sue for the plaint rent by reason of the surrender of their term by the lessees and though he did not derive his title from them and he contends that the Rajah should be treated in his capacity of surrenderee as an assignee of the lessees and as such a person claiming under them. This is a difficult question which seems to be *res integra* and which has therefore to be decided on general principles. After careful consideration I think with my learned brother that the contention is untenable. The effect of a surrender of his lease by the lessee is to determine the tenancy and to let in the landlord's rights. This is so stated in S. 111 of the Transfer of Property Act and as regards English Law in Woodfall's "Landlord and Tenant." In a surrender there is no transfer rights from one to the other but

only an extinguishment of the lessee's rights. The under lessees will no doubt not be prejudiced by their lessor's surrender as laid down in S. 115, Transfer of Property Act, but that is because to the extent to which the lessee has parted with his rights in the property to his under-lessees his surrender could not take effect. It is this I think that is meant by the observation of *Channel, J.*, in *Waller v. Yalden*¹ when his Lordship observed that "the law is that a lessee can only give title to his lessor by surrender to the same extent that he could give it to another person by his assignment." This observation was made with reference to a title created by prescription against the lessee and cannot be extended to apply to a case of *res judicata* against him which in my opinion creates no title nor interest in property. We cannot hold that the rule of *res judicata* creates any right or interest in the property though it may indirectly affect the rights of persons against whom it is effective. The rule is a rule of personal estoppel and does not attach itself to property. A lessee may defeat by surrender the advantage of *res judicata* which another has against him; there is nothing to prevent him from doing so, so far as I can see. If the third party had wanted to bind the landlord by the decision he should have taken care to have had him made also a party to the suit. I therefore agree that no estoppel arises from the decision in O. S. Nos. 571 and 572 of 1903 against the Rajah.

The plea of *res judicata* failing in toto I agree to the order proposed by my learned brother.

A. V. V.

Appeal remanded.

[The case has been sanctioned for Report only with reference to the point on which their Lordships agreed. Rep.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE OLDFIELD, AND MR. JUSTICE RAMESAM.

Bal Naicken

... Appellant * (Plaintiff.)

v.

Achama Naicken

... Respondent (Defendant).

Evidence Act, S. 108—Person not heard of for more than seven years—Presumption as to when he died.

In a case where the point of time to which death has to be referred may be placed indifferently either during the seven years or after the lapse of the seven years, (it not being necessary for the plaintiff to show that the person

* S. A. No. 2051 of 1920.

20th April, 1921.

1. (1902) 2 K. B. 304.

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Ramanthaswami.

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Achama Naicken.

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lived during the seven years), there is a presumption after the lapse of the seven years in favour of the death and it is for the other side to displace the presumption and the party relying on the presumption is entitled to succeed if no evidence is offered by the other side. *Muhamad Shariff v. Bande Ali* (1) and *Ellamandayya v. Lakshmayya* (2) dissented from.

Second Appeal against the decree of the Court of the Subordinate Judge of Dindigul in Appeal Suit No. 68 of 1920, presented against the decree of the Court of the Principal District Munsif of Dindigul in O. S. No. 1407 of 1918.

C. V. *Anantakrishna Iyer* and R. *Srinivasa Iyengar* for appellant.

G. K. *Narayan* for respondent.

The Court delivered the following

Judgment :—It is true that it has been pointed out in several cases that while there is a presumption that a person is dead when he or she has not been heard of for seven years, there is no presumption as to the particular date on which he or she died (*Vide*, Lord Denman, C.J.) in *Nepean v. Doe* ³, Giffard, L.J. in *In Re Phene's Trusts* ⁴ and *Venkata Hanumanulu Garu v. Lachchamma* ⁵ and the burden of proving the actual date of death lies on the person who has to bring his suit after the death of the person who is unheard of, and within a particular period after the death. But these remarks apply only when the point of time at which the death has to be placed falls necessarily within the seven years. (*Vide* the above cases and Halsbury's Laws of England, Vol. 13, page 500, paragraph 692) or necessarily beyond the seven years, *Veeramma v. Chenna Reddi* ⁶. With great deference to the learned Judges who decided the cases in *Muhamad Shariff v. Bande Ali* ⁷ and *Ellamandayya v. Lakshmayya* ⁸ we are unable to follow the reasoning in them. In our opinion, in a case where the point of time to which the death has to be referred, may be placed indifferently either during the seven years or after the lapse of the seven years (it not being necessary for the plaintiff to show that the person lived during the seven years), there is a presumption after the lapse of the seven years in favour of the death and it is for the other side to displace the presumption and the party relying on the presump-

1. (1911) I. L. R. 34 All. 36.

3. 2 M. and W. 894, 150 E. R. 1021.

5. (1904) 14 M. L. J. 464.

7. (1911) I. L. R. 34 All. 36.

2. (1917) 6 L. W. 633.

4. 5 Ch. A. 139 at p. 143.

6. (1912) I. L. R. 37 Mad. 440.

8. (1917) 6 L. W. 633.

tion is entitled to succeed if no evidence is offered by the other side. The decision in *Veeranma v. Chenna Reddi*¹ and the decision in *Oleti Chinna Kamakshayya v. Oleti Kotilingam and others* in Second Appeal 1911 of 1918 are perfectly consistent with this view. In the former of these cases, the presumption relied on was that a person was alive up to the end of the seven years during which he was not heard of and in the second case the presumption sought was that the person died within three months after he was last heard of and both these presumptions are not permissible. In our opinion the distinction sought to be drawn in *Ellamandayya v. Lakshmayya*² that the presumption applies only to the date of the suit and not to any antecedent date though such date is after seven years is not supported by any English authority and is not quite intelligible.

In this case, if the plaintiff shows that Thatha Naicken had not been heard of for a period of 7 years which 7 years terminated prior to August 1918, the plaintiff is entitled to succeed. The decree of the Subordinate Judge is reversed and the appeal remanded for disposal according to law. Costs of this appeal will abide the result. Stamp value will be refunded on application.

Second Appeal Remanded.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE NAPIER AND MR. JUSTICE KRISHNAN.

Elumalai Chetty, Jagannadha Chetty ... *Appellants* * (*Defendants* 1 and 2).

v.

P. Balakrishna Mudaliar ... *Respondent* * (*Plaintiff*).

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krishna
Mudaliar.

Evidence Act, S. 91—Mortgage by deposit of title deeds—Evidence of—Letter relied upon as evidence held to be a simple mortgage by itself and to be inadmissible because unregistered—Other evidence—Admissibility—Transfer of rights under mortgage by deposit of title deeds—Mortgage by pro-note and deposit—Registered transfer of mortgage rights—Necessity—Mere indorsement of pro-note—Sufficiency

* S. No 527 of 1920.

31st March, 1921.

1. (1912) 1 L. R. 37 Mad 440.

2. (1917) 6 L. W. 333.

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Where a document relied upon as evidencing a prior mortgage by deposit of title deeds is held to constitute a simple mortgage by itself, and, being unregistered, to be inadmissible in evidence under S. 49 of the Registration Act other evidence is admissible to prove the terms of the equitable mortgage, and S. 91 of the Evidence Act is no bar to the reception of such evidence.

An indorsee for value of a negotiable instrument the amount of which had been secured by a mortgage by deposit of title deeds does not get any right to the mortgage in his indorsee's favour by the mere indorsement of the note without a registered transfer of the mortgage rights.

Second Appeal against the decree of the Court of the Temporary Subordinate Judge of Chingleput in A. S. No. 42 of 1919, preferred against the decree of the Court of the District Munsif of Trivellore in O. S. No. 924 of 1917.

Judgment :—Following the ruling in *Muthiah Chetty v. Kothandaramaswami Chetty*¹ on the point, we agree with the Lower Appellate Court that evidence was admissible to prove the terms of the mortgage by deposit of title deeds *aliunde* in spite of the subsequent so called simple mortgage and that S. 91 of the Evidence Act is no bar to the reception of the evidence. It is contended however that the assignment to the plaintiff did not vest the mortgage as there was no registered instrument. It is suggested that the transfer was a sale within S. 54 of the Transfer of Property Act. We do not think that that is clear. It may be that the transfer was for collection only in which case the decision in *Cunniah v. Gopala Chettiar*,² would have to be considered. We must therefore call for a finding on this point. Fresh evidence is allowed. Two months are allowed for submission of findings and ten days for objections.

[In compliance with the order contained in the Judgment herein, the Subordinate Judge of Chingleput submitted the following]

FINDING :—I have been directed by their Lordships to submit finding on the following issue :—

“ Whether the transfer to the plaintiff was for collection only ”.

The plaintiff was recalled and examined and one more witness Mr. Oakley of Messrs Oakley Bowden and Co., was examined. Their evidence leaves no room for doubt that the question should be answered in the negative.

1. (1916) 31 M. L. J. 847 at 353.

2. (1918) 26 M. L. J. 242.

The plaintiff was a Dubash in the firm of Messrs. Oakley Bowden between the years 1911 and 1918. As Dubash his business was to introduce customers and secure indents from them for forwarding the same to merchants abroad through the firm. The Dubash was ultimately responsible to the firm in all cases where the dealers failed to honor drafts or pay up dues. The practice appears to be that when customer defaults to pay, the Dubash is debited with the amount due by the former. The above appears clear both from the evidence of the plaintiff and that of Mr. Oakley.

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In the present case, the evidence shows that the 1st defendant indented for rice bowls and failed to honor the draft. As the amount due could not be realised from him the Dubash (plaintiff) was debited with the amount due. This was in September 1916 (*See Exhibit G, page 156*). The sum of Rs. 3,654 odd debited to plaintiff in the firm's accounts is made up of the amount due by 1st defendant and other amounts for which the plaintiff was responsible.

The evidence of Mr. Oakley in cross-examination is "In September 1916 as the promisor under the note Exhibit A did not pay us money, we debited the Dubash (plaintiff) with the value. In September 1916 if plaintiff wanted it, I should have transferred the note to him. In April 1917 as plaintiff wanted to have the transfer it was made". In re-examination the witness says : that the firm transferred the note to the plaintiff as the attempt to recover money from the defendants was infructuous. The plaintiff admits in his evidence that with his consent the debit in Exhibit G was made. That being the evidence it follows that the transfer was not for mere collection; the firm having substituted the liability of the plaintiff for the liability of the defendant, it had no more concern with or title to the suit note.

I find the point accordingly in the negative.

P. Durasami Aiyangar and *S. Rangaswami Aiyangar* for Appellant.

E. Durasami Aiyar and *T. N. Srinivasa Sastry* for Respondents.

The Court delivered the following

Judgments :—*Krishnan, J.* :—The first question that arises for our decision in this Second Appeal is whether an indorsee for value of a negotiable instrument the amount of which had been secured by a mortgage by deposit of title-deeds can claim

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to enforce the mortgage in the absence of a registered instrument conveying the mortgage rights to him.

A somewhat similar question arose before the Learned Chief Justice and my learned brother with reference to an indorsee for collection in *Cummaiya v. Gopala Chettiar* ¹ and was answered in the indorsee's favour. That decision however, is not conclusive in this case as here we have an indorsee for value and the judgment of my learned brother in that case was based entirely on the fact that the indorsement was for collection; and though the Learned Chief Justice makes no such distinction, my learned brother did not apparently agree with his Lordship's views. Sitting with Hughes, J., the learned Chief Justice has again stated his view in *Perumal Ammal v. Perumal Naicker* ² that though the rule is now that a mortgage right or debt cannot be transferred without a registered instrument under S. 54 of the Transfer of Property Act it is subject to the exception that "where the law still admits of the separate transfer of the mortgage-debt as by the indorsement of a promissory-note secured by a deposit of title-deeds or by the attachment and sale in execution of a mortgage debt S. 8 of the Transfer of Property Act still operates to carry the security with it." We are, of course, not concerned with court sales of mortgage debts or their effect in this case; that will be governed by the special provisions of the Code of Civil Procedure. The observation regarding promissory notes is clearly an *obiter dictum* if I may say so with respect; and though the opinion of the Learned Chief Justice is entitled to great weight, there is no decision binding on us and we must, therefore, consider the question raised before us on its merits.

It seems to me quite clear that a mortgage of immoveable property is itself immoveable property under the Transfer of Property Act whatever the form of the mortgage may be; and the transfer of ownership of such a right falls under S. 54 and will require a registered instrument for the purpose: *Vide Sakhiuddin Saha v. Sonaulah Sarkar* ³. It is true that the Chief Justice sitting on the Original Side as Wallis, J. (as he then was) held, relying on S. 8 of the Act, that the transfer of a mortgage was the transfer of the debt with its attendant

1. (1918) 26 Mad. L. T. 242.

2. (1920) 40 Mad. Law Journal 25. 3. (1918) 22 C.W.N. 641 and 40 M.L.J. 25.

securities and that registration was, therefore, unnecessary for the transfer of a mortgage. *Vide Dwaraka Doss Govardhana Doss v. Dhanakoti Ammal* ¹. There was some conflict of opinion on the point. See *Subramanyam v. Perumal Reddi* ² on one side and the opinion of Bashyam Ayyangar, J., in *Ramasami Pattar v. Chinnan Asari* ³ and the decision of Chamier, J., (as he then was) in *Mutsaddi Lal v. Muhammad Hanif* ⁴ following it, on the other side. In this conflict of views the Legislature amended the Act in 1900 and excluded mortgage debts from the category of actionable claims. The object was plainly to remove mortgage debts from the scope of S. 8 which speaks of "debt or other actionable claim", and to make it necessary to have a registered instrument for its transfer. It was on the application of S. 8 that it was held that the transfer of a mortgage did not require registration and with the non-applicability of the section resulting from the amendment one would have thought that all doubts regarding the necessity of having a registered instrument for the transfer of a mortgage right in all cases would have been removed. But the learned Chief Justice thinks as stated above, that though the rule is now clear with reference to mortgage debts in general there is still an exception in favour of mortgages by deposit of title-deeds where promissory notes have also been taken for the mortgage amounts. With every respect for his Lordship's opinion I find it difficult to follow it. It is clear from his judgment in the case that he would have held that a registered instrument would be necessary to convey the mortgage rights even in a case of a mortgage by deposit of title deeds if no negotiable instrument had been taken for the mortgage amount. Does the taking of the negotiable instrument make any difference on the point? I think not, as the mortgage debt is none-the-less a mortgage debt because it happens to be also a promissory note debt. If it is a mortgage debt, S. 8 cannot apply to it and the whole argument based on the section fails.

The fact that the promissory note can be transferred by endorsement, it seems to me does not make any real difference on the question before us. When the note amount is so transferred it seems to me, it is not transferred as a secured debt at all. The Negotiable Instruments Act makes no provision with

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1. (1913) 15 M. L. T. 198.

2. (1895) I. L. R. 18 Mad. 454.

3. (1901) I. L. R. 24 Mad. 449 at 463

4. (1912) 10 A. L. J. 167.

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reference to securities. In my view it is only if a mortgage debt is transferred as a secured debt that it will carry the securities with it on the principle embodied in S. 8; and not otherwise. Even in the case of a mortgage where there is no promissory note it cannot, I think, be said that the law does not allow the mortgagee to transfer the debt as an unsecured or simple debt without a registered instrument if he thinks fit to do so. The security is for his benefit and he can give it up if he likes; and the transferee will then get the right to the debt but not to the security. Thus, as regards transferability in law as an unsecured debt, a mortgage debt for which a negotiable instrument has been taken does not seem to me to differ fundamentally from one where none such has been taken. In my view, in either case if the debt is transferred by endorsement or otherwise without the transferor taking care to transfer the mortgage right by a registered instrument, the debt and the security will get disassociated and the security may possibly cease.

If we are to hold that the security passes by the indorsement of the promissory notes in cases of mortgages by deposit of title-deeds where notes have been taken for the mortgage amounts we must hold the same view with reference to any kind of mortgage where the mortgagee happens to have taken a promissory note for the mortgage amount; for the argument will be just the same. We will also have to hold that not only the first indorsee but every subsequent indorsee including even blank indorsees will obtain the mortgage rights by indorsement unless, of course, a different intention is manifest. This view, I think, will introduce a grave uncertainty into the registration of mortgages and render the records of the Registration office unreliable in ascertaining in whom the mortgage right subsists, for the time being. Such a view, therefore, does not commend itself to me. If I am right in thinking that S. 8 does not apply to mortgage debts, there is no scope for the application of the *maxim generalia specialibus non derogant*. But if it did apply, I am inclined to think it would make S. 54 of the Act override S. 8 rather than the other way; for S. 8 refers to all kinds of securities whereas S. 54 so far as is relevant, refers only to a limited class or securities—the mortgage securities. See *Mutsaddi Lal v. Muhammad Hanif*¹.

1. (1912) 10 A. L. J. 167.

No valid argument can be based on the alleged anomaly of holding that the transfer of a mortgage by deposit of title deeds requires registration when the creation of it does not ; for that seems clearly to be the law at any rate where there is no promissory note involved.

Elumalai
Chetty
v.
P. Bala-
krishna
Mudaliar.

Krishnan, J.

After careful consideration I have come to the conclusion, though not without hesitation on account of the opinion of the learned Chief Justice to the contrary, that the indorsee of a negotiable instrument does not get any right to the mortgage by deposit of title deeds in his indorser's favour by the mere indorsement of the note without a registered transfer of the mortgage rights.

On this view it is argued that the District Munsif had no jurisdiction to try the suit as his jurisdiction was based solely on the fact that some of the lands mortgaged were within his jurisdiction. It is contended that on the finding that the mortgage rights did not pass to the plaintiff the Court lost jurisdiction. That is not so ; jurisdiction has to be judged on the averments in the plaint, unless indeed an averment has been fraudulently made for the express purpose of giving jurisdiction. There is no such allegation here. Jurisdiction does not depend upon the relief the Court finds itself able to give after trial. The jurisdiction of the Court in this case is, therefore, not affected by the view I am taking ; but the decree so far as it gives relief against the property mortgaged must be set aside.

There will be a personal decree only against defendants 1 and 2 for the amount found due and interest at 6 per cent. from date of suit to date of payment. The rest of the suit is dismissed. The order as to costs in the first Court will stand but the parties will bear costs in this and the Lower Appellate Court.

Napier, J. :—I agree. I had already prior to the hearing of the case before the Learned Chief Justice expressed my opinion in an unreported case. I saw no reason to alter it during the argument in that case nor do I now.

Napier, J.

A. S. V.

PRESENT:—SIR JOHN WALLIS, C. J. AND MR. JUSTICE NAPIER.

v.

**Murugappa
Chettiar
and anothers
v.
Ponnuswami
Pillai.**

Whether Memorandum of cross objections by the Respondent can be heard

Where an appeal has abated after the death of the Appellant the Respondent is not entitled to have his memorandum of cross objections heard and determined. *Alagappa Chettiar v Chockalinga Chettiar* 1, referred to.

S. Varadachariar with T. V. Ramanatha Iyer for respondent.

The Court delivered the following

Judgment :—Following the Full Bench decision in *Rustomji Dorabji v. Nurse and another* ² we hold the appeal abates ; and is dismissed with costs.

In this case the plaintiff preferred an appeal from a decree in his favour in a suit for malicious prosecution on the ground that the damages awarded were insufficient, and the defendant who had not appealed from the decree, filed a memorandum of objections contesting the decree. The plaintiff having died subsequently his appeal abated, as we have just held, on the authority of the Full Bench decision in *Rustomji Dorabji v. Nurse and another* ² and *Josiam Tiruvengadachariar v. Swami Iyengar* ³.

The question then argued before us was whether the respondent in the appeal is none the less entitled to have his memorandum of objections heard and determined. O. 41, R. 22 (4) C. P. C. gives him such a right when after the filing of his memorandum of objections the appeal has been withdrawn or dismissed for default, but not when it has abated, if the legislature had intended that he should have such a right

Appeal No. 316 of 1919.

29th March, 1921.

1. (1918) I. L. R. 41 Mad 907.

2, (1921) 40 M. L. J. 173.

3. (1911) I. L. R, 34 Mad. 76. •

in cases of abatement also, it would have said so. R. 22 (1) entitled a respondent though he may not have appealed from any part of the decree, not only to support the decree on any of the grounds decided against him in the court below, but, also, to take any cross objection to the decree which he could have taken by way of appeal. The intention of the rule is not to give a respondent who has allowed his own right of appeal to become barred a fresh substantive right of appeal, but only to allow him to take cross objections on the appeal filed by the other side, and if that appeal goes the right to take cross objections goes with it. As however it would be a hardship to allow an appellant to prevent the memorandum of objections from being heard by withdrawing the appeal or allowing it to be dismissed for default, the legislature has thought fit to provide that in such cases the memorandum of objections may "nevertheless be heard and determined. The use of the word "nevertheless" is significant, especially when read with the words "cross objections" which has been substituted for objection which occurred in S. 561 of the Old Code. This language shows that the legislature did not intend to alter the law by which the entertainment of objection was made contingent and dependent upon the hearing of the appeal. Whatever may be the reasons for the omission in R. 22 (1) of the words "upon the hearing" which occurred in S. 561, the Rule is sufficiently plain as it stands as held by the Full Bench in *Alagappa Chettiar v. Chockalingam Chettiar*¹ in which it was ruled that where an appeal is dismissed as barred by limitation the memorandum of objections cannot be heard.

Murugappa
Chettiar
and another
v.
Ponnuswami
Pillai.

The memorandum of objections is dismissed with costs.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR JOHN WALLIS, CHIEF JUSTICE AND MR. JUSTICE KRISHNAN.

Thanneru Gangayya

... Appellant * (Plaintiff.)

v.

Bommadevara Subbanma and others... Respondents (Defendants.)

Transfer of Property Act—S. 59—Mortgage—Attestation—Proof—Quantum—Examination of one attesting only if enough—Evidence Act—Ss. 68, 69—Effect—

* Appeal No. 102 of 1920.

6th April, 1921.

1. (1918) I. L. R. 41 Mad 907.

Thauneru
Gangayya
v.
Bomina-
devara
Subbamma
and others.

Attesting witness—Proof by—Favourable answer in Chief Examination—Witness turning hostile in cross-examination and giving unfavourable answers—Effect.

To prove that a mortgage deed has been duly "attested" as required by S. 59 of the Transfer of Property Act, it is not enough to call one attesting witness to speak to the execution of the deed. It is necessary also to prove that the deed has been attested by a second witness as required by that section. *Ram Dei v. Munna Lal* (1), *Shub Dayal v. Shoo Ghulam* (2) and *Minor Venkata Reddi v. Muthu Pambula Naick* (3) dissented from.

All that Ss. 68 and 69 of the Evidence Act do is to impose a particular mode of proof and to require that certain documents shall be proved in a particular way, and in no other, that is to say, if one attesting witness is alive, execution and attestation cannot be proved by other witnesses, though they may be available, and, if no attesting witness is available, execution and attestation cannot be proved by other evidence, without proving that the attestation of one attesting witness at least is in his handwriting. Those sections do not have the effect of dispensing with the necessity of proving that the deed is attested by at least two witnesses as required by S. 59 of the T P Act.

Where, in a case in which one only of the attesting witnesses was alive, the mortgagee called him to prove the execution and attestation of the mortgage deed, and he, in his examination-in-chief, spoke to the execution of the deed and its attestation by him, but having been got at by the opposite side, gave answers in his cross-examination which would put plaintiff (the mortgagee) out of court so far as proof of execution and attestation was concerned, and the plaintiff himself spoke to the handwriting of another attesting witness held that the mortgage deed had been duly proved.

Appeal against the decree of the Court of the Subordinate Judge of Bezwada in O. S. No. 50 of 1918.

P. Somasundaram, P. Markendeyalu and K. Satyanarayana-murthi for appellant.

T. Venkatarama Aiyer and T. V. Ramanatha Aiyar, for respondent.

The Court delivered the following

Wallis, C. J.

Judgments :—The Chief Justice :—This is an appeal from the judgment of the Subordinate Judge of Bezwada dismissing a suit by a mortgagee on two mortgages on two grounds, namely, that the mortgages were not duly proved for want of attestation and that there was no consideration.

I propose to deal with the second finding first. The defendant who is said to be so is alleged to have executed the suit documents in 1907 when she was between 60 and 70, and the second witness for the plaintiff on whom the defendants now rely says that she was an intelligent woman. She admits that about that time she was constructing or reconstructing certain godowns. Both the mortgages recite that the advances

1. (1916) I. L. R. 39 All. 109.

2. (1916) I. L. R. 39 All. 241.

3. (1920) 39 M. L. J. 463.

under them were made to her for the purpose of erecting these godowns. She now denies that she acknowledged the execution of both these documents before the Sub Registrar, but this admission is proved, and according to the rules and practice, I have not the least doubt that the substance of the transactions was explained to her including the recital that money has been advanced to her for this construction and that with full knowledge of this, she acknowledged execution. Therefore I think that her evidence is entitled to very little weight. Further she has not given a proper account of the means by which she acquired money to build these godowns. She said that she obtained the necessary funds by lending out the rents which she had received. There is really no good reason to doubt that she received satisfactory consideration. The Subordinate Judge practically puts the burden of proving consideration upon the plaintiff instead of putting the burden of proving want of consideration upon the defendant. Then as to the question whether the suit mortgages are proved to have been duly attested, I think that the mortgages were duly proved. There were three attesting witnesses, of whom two are dead and one was called as plaintiff's 2nd witness. The plaintiff himself as his 1st witness proves that both the documents were attested by the late Venkataswami Naidu who was the Municipal Chairman of Bezwada. They bear his signature. Then we have to deal with the evidence of plaintiff's 2nd witness whom the plaintiff was bound by law to call under the provisions of S. 68 of the Indian Evidence Act, because if attesting witnesses are alive, at least one of them must be called. That witness gives in examination-in-chief clear evidence of attestation. He says "I attested both of them, and the executants (that is to say, the defence 1st witness and another) admitted receipt of the money....." "The 1st defendant built godowns. I saw it.....The 1st defendant is an intelligent woman. She is conversant with business. The deeds were read out before the executants signed (or affixed marks.) I also asked them if the contents are true and correct. They said "yes." Then he goes on to say what happened before the Sub Registrar. "I was an identifying witness before the Sub Registrar. These are Exs. A and B. Veeraraghaviah and Venkatasami are both dead. The 1st defendant affixed her mark and the late Venkatakrishniah signed in the two deeds in

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and others.
Wallis, C. J.

my presence. Venkatasami was the manager of the Superintending Engineer's Office. I do not remember if I attested before the 1st defendant affixed her marks and Venkatakrishnayya signed the deeds." No attesting witness affixes his mark before the signatories and the last silly answer does not in any way detract from the effect of his evidence in his examination in chief. As I have pointed out the plaintiff had no choice about calling this man. He was bound to call him and he gave evidence in his examination-in-Chief which would support the plaintiff's case. Then he was subjected to cross-examination and in my opinion his cross-examination shows that he had been got at, that he had arranged to answer every leading question which was put to him by the vakil on the other side in the affirmative and that it was easy for the vakil to put questions to him and get answers which, if believed, would put the plaintiff out of court so far as proof of attestation and execution were concerned and this is what happened, because in cross-examination he went back on what he had previously said. He said "I did not see the plaintiff on either occasion. Nor did I see him at the Sub-Registrar's Office. The executants did not tell me then that they received consideration." (He said previously that they told him so). "The 1st defendant said I may attest because her son and she were both present then" (that is to bring the case within the definition of the Privy Council, that mere attestation of mere acknowledgment is not sufficient). "Venkatadri read out the deeds. But the 1st defendant kept quite.....The 1st defendant did not affix her mark and the late Venkatakrishnaiah did not sign the deeds in my presence." This is exactly the opposite of what he previously said. In my opinion he had clearly been got at and I am entitled to act upon his sworn evidence which he gave in examination-in-chief. It is admittedly his signature which he signed as an attesting witness. He swore that he was present and that the documents were duly executed and there is no reason to disbelieve him. The plaintiff's 3rd witness is certainly worthy of credit. The result is that I must hold on the evidence of the plaintiff coupled with the evidence of his witnesses that the documents have been duly proved.

It was contended for the appellant that under S. 68 of the Indian Evidence Act it was enough to call one attesting witness

to speak to the execution of the documents only by the executors and that there was no necessity to prove even in a mortgage that the mortgage had been attested by a second witness, as required by S. 59 of the Transfer of Property Act and the decisions in *Ram Dei v. Munna Lal* ¹ and *Shib Dayal v. Sheo Ghulam* ² and *Minor Venkata Reddi v. Muthu Pambula Naick* ³ appear to support that contention. It is unnecessary to decide that point now. But I desire to say with great respect that as at present advised I am unable to take that view. All that Ss. 68 and 69 do is to impose a particular mode of proof and to require that certain documents shall be proved in a particular way and in no other way, that is to say, if one attesting witness is alive you cannot prove execution and attestation by other witnesses although you have them, without calling the attesting witness, and if no attesting witness is available then similarly S. 69 says that you cannot prove execution and attestation by other evidence unless you prove the handwriting of at least one attesting witness. The other view would have the effect of dispensing with the proof of a necessary ingredient to the validity of a document.

We have been referred to the common forms regarding proof of wills and in every case of proof, evidence is given not only of the execution but also of due attestation (See Forms in Tristram and Coote's Probate Practice, 15th Edition p. 792). I am not inclined to think that these sections in any way dispense with the proof of what the law requires. All that they do is to apply the principle that you must prove a document by the best evidence, that is to say, when there are attesting witnesses, you must prove execution by calling at least one of them, and if they are not available, you must prove that the handwriting is that of one of the attesting witnesses.

In the result, the appeal must be allowed and the suit decreed with costs throughout. Time for redemption three months.

With regard to the 2nd and 3rd defendants who claim by title arising before the date of the suit mortgages and have been exonerated from the suit in the Lower Court, they will not be affected by the decree but they will have no costs.

Krishnan, J. :—I agree.

A. S. V.

Appeal allowed.

Thanneru
Gangayya
v.
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devara
Subbamma
and others.
Wallis, C. J

Krishnan, J

1. (1916) I L. R. 39 All. 109.

2. (1916) I L. R. 39 All. 241.

3. (1920) 30 M. L. J 463.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SADASIVA IYER AND MR. JUSTICE SPENCER.

Vaidynathaswamy Iyer ... *Appellant* (2nd Plaintiff.)

v.

Natesa Malavarayan and
others ... *Respondents* (Defendants 2 to 12,
15 to 42 and 44 to 65 and
Plaintiffs 1 and 3.)

Vaidynatha-
swamy
Iyer
v.
Natesa
Malavarayan
and others.

Evidence Act—S. 90—Document over 30 years old—Genuineness—Presumption—Discretion as to—Exercise of—Principles—Discretion of Court below—Interference in appeal—Grounds.

The presumption under S. 90 of the Evidence Act as to documents over 30 years old has to be made with some care. In the case of registered documents such a presumption is very readily raised, and in the case of other documents, unless by reason of their appearance or by reason of internal evidence there are some cogent considerations which recommend them to the favour of the Court, the Court is not bound to raise such a presumption usually. The discretion of the lower Court as to the raising of the presumption ought not to be interfered with in appeal, unless the reasons given by it are *prima facie* unsound.

Their Lordships declined to interfere with the discretion of the Courts below in refusing to presume the genuineness of the alleged counterpart of a mortgage deed, though the Lower Appellate Court had made certain erroneous observations in its judgment.

Second Appeal against the decree of the District Court of Tanjore in Appeal Suit No. 378 of 1916 dated the 27th day of August 1917, preferred against the decree of the Court of the Subordinate Judge at Kumbakonam in O. S. No. 123 of 1913.

A. Sundaram S. Srinivasa Aiyangar and E. Sankaran Unni for appellant.

V. C. Seshachariar and P. Vaidhinatha Aiyar for respondents.

The Court delivered the following

Sadasiva
Aiyar, J.

Judgments :—*Sadasiva Aiyar, J. :—*The 2nd plaintiff is the appellant. The suit was brought for redemption of a mortgage effected under a document, the counterpart of which is alleged to be Ex. H, which is dated in 1824.

The main question for consideration therefore is whether Ex. H is genuine. The Court of First Instance refused to presume under S. 90 of the Evidence Act that it was a genuine document and called for proof of the same and as no reliable proof was forthcoming that Court dismissed the plaintiff's suit.

The Lower Appellate Court confirmed the decree of the Court of First Instance on substantially the same grounds. The point therefore for decision is whether the Lower Court ought to have used the discretion vested in them by S. 90 of the Evidence Act in favour of the plaintiffs.

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swamy Iyer
v.
Natesa
Malavarayan
and others.

Sadasiva
Aiyar, J.

It must be admitted that the learned District Judge has made certain erroneous observations in his judgment. If a Court is prepared to presume the genuineness of a document under S. 90 of the Evidence Act, the question whether the endorsement of the Stamp-vendor thereon sets out the true facts as to the name of the purchaser of the stamp and the object for which he wanted the stamped cadjan is not so much a question governed by S. 90 as by S. 114, an illustration to which provides that the regularity of official acts might be presumed. Then the Judge (probably misled by some arguments advanced before him) thought erroneously that the endorsement of the native Registrar who issued this and other stamped cadjans originally was the certificate of registration of the Registering Officer referred to in S. 9 of the Registration Regulation 17 of 1802 and has made some observations on the erroneous basis that the document was registered two years after its execution, whereas the document was not registered at all. Further the 2nd plaintiff's character as shown by the result of prior litigations was given too much weight in considering whether a presumption under S. 90 ought to be raised or not with reference to Ex. H. Also the District Judge seems to have treated Ex. A which is a Registration copy of a still older document as not above suspicion and the reasons he gives for looking upon that document also with suspicion might not be quite satisfactory.

But the main question in this case is whether the discretion vested in the Lower Courts as to the raising of the presumption as to the genuineness of the document purporting to be over thirty years old, (Ex. H.) was used so unreasonably as to call for the interference of this court in Second Appeal. The presumption under S. 90 as to documents over thirty years old has to be made with some care. In the case of registered documents such a presumption is very readily raised; and in the case of other documents, unless by reason of their appearance or by reason of internal evidence there are some cogent considerations which recommend them to the favour of the Court,

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the Court is not bound to raise such a presumption usually. In the present case the fact that the document, Ex. H, is written on a stamped cadjan of the value of two annas whereas a stamped cadjan of the value of Rs. 2 was required under the Stamp Law then in existence (Regulation 13 of 1860) and the fact that the unusually long term of 70 years is mentioned with the added circumstance that it had not been produced in a former suit where it might be expected to have been produced seem to have weighed with the Lower Courts in not raising the presumption. In *Shafiq-un-nessa v. Shaban Ali Khan* ¹ Their Lordships of the Privy Council refused to overrule the discretion of the Lower Courts in the matter of raising the presumption of genuineness in respect of an apparently very old document because the reasons given by the Lower Courts were not *prima facie* unsound. In the result I see no sufficient reason to interfere with the discretion of the Lower Courts, in the present case. I would therefore dismiss the second appeal with costs.

Spencer, J.

Spencer, J. :—I agree and have nothing to add.

A. S. V.

Second Appeal Dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE SPENCER.

Pusarapu Venkata Reddayya ... *Appellant* * (*Plaintiff*).

v.

Thoram Yarakayya and others ... *Respondents* (*Defendants* 19, 1 to 4, 7, 9, 10, 12, 13, 20 to 24, 28, 29 and party respondent in the High Court.)

Venkata
Reddayya
v.
Thoram
Yarakayya
and others.

Limitation Act—Art. 182, Cls. (5) and (1)—Execution of decree—Limitation—Decree in favour of one person—Transfer of portions thereof to different persons Execution application by one of the transferees as regards portion of decree transferred to him—if saves limitation as regards other transferees in regard to their portions of decree.

Where a decree for partition of immoveables and moveables is passed in favour of one person only but is transferred to two different persons, the portion relating to immoveables being transferred to one, and that relating to moveables to the other, an application in accordance with law made by either transferee to the proper court for execution of his portion of the decree or to take some step in aid of execution of that portion enures under Art. 182, Cl. (5) of the Limitation Act for

* S. A. No. 2051 of 1920.

18th February, 1921.

1, (1904) I. L. R. 26 All. 581.

the benefit of the other transferee as regards the portion of the decree transferred to him.

The provisions of Cl (5) of Art. 182 ought not to be restricted by extending the words of the 1st sentence of explanation (1) of the Article to cases where the decree though passed only in favour of one person is afterwards owned by more persons than one in severalty owing to the conduct of the original decree-holder or otherwise.

Venkata
Reddayya
v.
Thoram
Yarakayya
and others.

Second Appeal against the decree of the District Court of Kistna at Masulipatam in A. S. No. 102 of 1915, preferred against the decree of the Court of the Subordinate Judge of Kistna at Ellore in O. S. No. 35 of 1913.

The Court made the following

Order :—For a satisfactory disposal of this case, it is necessary to obtain a finding from the Lower Appellate Court on issue II (a) in the suit, namely :—

“Whether the 1st defendant's rights in the properties decreed to him in O. S. No. 3 of 1897 on the file of the District Court, Godavari, have become extinguished by his failure to execute the said decree as alleged by defendants 1 to 3, 8 to 13, 15 to 17, 19, 21 to 25?”

Further evidence on this point might be allowed to be adduced by both sides.

The parties might also be permitted to adduce relevant further evidence as regards the nature and the dates of the pleadings in the former partition suit and the District Judge will find on those points also.

The findings will be submitted in eight weeks from the date of receipt of records in the District Court and ten days will be allowed for filing objections.

[The Lower Appellate Court submitted “I would therefore find on the issue that the rights of the 1st defendant Veera Subramaniam in the decree have not been extinguished by his failure to execute the decree in O. S. No. 3 of 1897”]

P. Somasundaram for appellant.

A. Krishnasami Iyer, for 1 to 4, 7 to 9 respondents.

K. Satyanarayanamurthi for 18th respondent.

The Court delivered the following

Judgments :—*Sadasiva Aiyar, J.* :—The plaintiff is the appellant before us in this Second Appeal. He brought the suit as the assignee of a mortgage bond executed by the 1st defendant in 1889 in favour of the 29th defendant's father. The validity of the assignment itself was questioned, but the

*Sadasiva
Aiyar, J.*

Venkata
Reddayya
v.

Thoram
Yarakayya
and others.

—
Sadasiva
Aiyar, J.

District Judge was justified in rejecting that plea as the assignor admitted the assignment.

The suit was brought for sale of the 1st defendant's rights in the mortgaged properties and the Subordinate Judge decreed the suit, the 1st defendant's interest being one-fourth share of the plaint properties as established in the preliminary decree for partition in a suit of 1897 brought by the 1st defendant as adopted son against the after-born natural son of his father. That decree for partition was dated in January 1902 and it decreed partition of the immoveable properties in A and B Schedules and of the moveables in C and D Schedules to the plaint. The 1st defendant transferred that portion of the decree which related to the immoveables in favour of one Seshamma and that transferee had kept alive at least her portion of the decree by successive applications till 19-4-1913, the present suit having been brought on the 23rd June 1913.

The District Judge dismissed the plaintiff's suit on the ground that the 1st defendant had lost all rights in the mortgaged properties, that is, the one-fourth share in the lands decreed to him under the partition decree by his having allowed that decree (so far as the interests retained by him after assignment to Seshamma were concerned) by his not having made any application for the execution of that decree within the time prescribed by law. He further held that his rights were also barred by the adverse possession of the lands by his father's natural son.

This second ground of decision cannot be supported and is not relied on by the learned vakil for the respondent.

Then as regards the first ground, Article 182 of the Limitation Act, clause (5), allows a decree-holder the right to execute his decree if within three years of the date of his application, there had been a previous application in accordance with law to the proper Court for execution, or to take some step-in-aid of execution of the decree. Seshamma was recognised as a decree-holder and she had filed an application on 16-4-1913 for execution of a portion of the decree transferred to her and hence if sub-article 5 is construed according to the plain import of the language used in the sub-article, the 1st defendant was entitled on the date of this suit to apply for execution of the decree as regards the A and B schedule immoveable properties mentioned in the decree and the learned District Judge's view that the 1st defendant's right

to execute this decree had become barred seems therefore to be clearly erroneous. But it is contended that by reason of the 1st sentence in explanation (1) to Article 182, the 1st defendant cannot treat the application of Seshamma as an application made in accordance with law to enure for the 1st defendant's benefit also. The 1st sentence is : "Where the decree or order has been passed severally in favour of more persons than one, distinguishing portions of the subject-matter as payable or deliverable to each, the application mentioned in Clause (5) of this Article shall take effect in favour only of such of the said persons or their representatives as it may be made by". This clause, it must be admitted, does not in terms apply to the present case because the decree was not passed severally in favour of more persons than one. I do not think it is permissible to restrict the provisions of sub-clause (5) which are intended for the benefit of decree-holders by extending the words of the 1st sentence of explanation (1) to cases not falling within its exact language (as is sought to be done by the learned vakil for the respondent and as was sought to be done by the successor of the learned District Judge who decided the appeal in the Lower Court and submitted the findings which we had called for). The suggested extension implies that the Legislature intended that not only where the decree was passed severally in favour of more persons than one but also where the decree though passed only in favour of one person was afterwards owned by more persons than one in severalty owing to the conduct of the original single decree-holder or otherwise, the application mentioned in clause (5) should take effect in favour only of that person among those who afterwards became entitled to own the decree who made it. As I said, I am not prepared to so extend the effect of the explanation (1). My above view seems to be supported by the decision in *Ramasami v. Anda Pillai*,¹ which is the judgment pronounced on review of the case decided in *Ramasami v. Anda Pillai*,².

In the result, the District Judge's decision is reversed and the decree of the Subordinate Judge restored with costs here and the Lower Appellate Court. Time for redemption is extended by six months from this date.

Spencer, J.—I agree.

Second Appeal allowed.

Spencer, J.

A. S. V.

Venkata
Reddayya
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Thoram
Yarakayya
and others.
—
Sadasiva
Aiyar, J.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR JOHN WALLIS, CHIEF JUSTICE, MR. JUSTICE SPENCER AND MR. JUSTICE KUMARASWAMI SASTRI.

P. M. A. R. M. Muthiah Chettiar ... *Appellant**

v.

Lodd Govinda Doss Krishna Doss Varu
and another ... *Respondents.*

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Civil Procedure Code, S. 146, O. 21, Rr. 15 and 16 and O. 22, R. 10—Construction of document—Whether transfer of part of a decree or the creation of a mere right to share in the amount that might be realised—Contract Act, S. 28—The right of a part transferee of a decree to execute the decree—His right to intervene in a pending execution application by his assignor—Civil Procedure Code O. 22, R. 10, whether applies to execution proceedings—Order purporting to be under O. 22, R. 10, appealability of—Assignee of a decree—Application for execution by an assignee—Discretion of Court—Civil Procedure Code, O. 21, R. 16—Inherent power of Court as to procedure where there are no specific rules in the Code.

L, the son of a mortgagee decree holder executed in favour of one, M a document the preamble of which stated that L had agreed to assign to the share holder, M "one eighth share or twelve and a half per cent of the decree amount together with the securities therefor and outstanding arrears of the rents and profits as standing on this day that may be realised (according to the accounts of the Taluk Office) for a consideration of 2,89,000." The document proceeded to state that in consideration of the said sum, L assigned "all the one eighth share in the above said sum now owing on the said decree and of all other securities for the said decree amount to which L may be entitled." There were also certain conditions that execution proceedings were to be carried on in the name of L as heretofore and he was at liberty to continue the execution proceedings in E. P. No. 145 of 1908 as he may think proper and be at liberty to enter into any compromise he thought fit. If the execution proceedings resulted in a sale M was to be entitled to an eighth share of lands purchased by the decree holder himself or to an eighth share in the sale proceeds if the lands were purchased by strangers. A private sale of the property comprised in the decree was to be made on consultation with M.

On a construction of the above terms, what is transferred is an eighth share of the decree and not simply a right to share in the amount that might be realised without the transferee having any interest in the decree itself.

The latter portion of the deed does not amount to a covenant whereby the transferee precludes himself absolutely from having anything to do with execution proceedings under all contingencies. It merely amounts to an appointment of L as the transferee's agent to realise the amount under the decree and the agency is revocable at the will of M.

If the stipulations in question have the effect of restricting M absolutely from enforcing his rights in execution as a part transferee of the decree, they are void under S. 28 of the Indian Contract Act and are therefore no bar to the entertainment of an execution application by him.

Under the Code of Civil Procedure of 1908 as well as under the Code of 1882 there can be a part transfer of a decree and the transferee of a part of a decree

can apply to execute the decree. He can also intervene in a pending execution application by the decree holder if it has not been properly conducted or prosecuted by the executing decree-holder.

Where an order is made by a judge purporting to act under O. 22, R. 10 of the Code of Civil Procedure the order is appealable, as in cases properly falling under O. 22, R. 10 of the Code. (*Abdul Rahiman Sahib v. Gangpathi Bhalhia* (1) and *Lakshmanan Chetty v. Ramanathan Chetty* (2) followed.

Per the Chief Justice and Spencer, J. (*Kumaraswami Sastri, J.* dissenting.) The provisions of O. 22, R. 10 of the Civil Procedure Code apply to proceedings in execution.

Per Kumarasami Sastri, J. O. 22, R. 10 which expressly refers to assignments, creation or devolution of any interest during "the pendency of a suit" in terms excludes applications after a final decree has been passed. The word "pendency of a suit" mean the interval between the filing the plaint and the passing of a final decree.

Per Spencer, J. A transferee decree-holder's right of execution of the decree does not depend upon the discretion of the Court. *Mollah v. Haidar Ali* 38 Cal. 13 at page 21 followed. The discretion of the Court should be confined to laying down the conditions upon which execution should be allowed to proceed. There is no room for the exercise of the Court's discretion otherwise.

Per Kumarasami Sastri, J. Where rights are conferred by the sections of the Code and no provision is made for a particular set of facts, courts ought to apply the provisions of the rules which are nearest in point with such modifications as may be necessary and not refuse relief on the ground that the legislature has not made provision for a particular case though within the generality of a section of the Code. The object of S. 151 is to give such powers to Courts and to prevent failure of justice.

Letters Patent Appeal against the judgment dated 28-1-1920 of the Hon'ble Mr. Justice Oldfield in Appeal Against O. 50 of 1919 preferred to the High Court against the order of the District Court of North Arcot dated 23rd December 1918 in E. P. No. 37 of 1918 in Q. S. No. 12 of 1901.

A. Krishnaswami Aiyar for the appellant.

T. Rangachariar, K. Bhashyam Aiyangar, A. Ramachandra Aiyar and *V. N. Venkatavaradachariar* for respondents.

The Court delivered the following

Judgments:—*The Chief Justice:*—This is an appeal under the Letters Patent from a judgment of Oldfield, J. Seshagiri Aiyar, J. dissenting dismissing, an appeal from an order of the District Judgment of Chittor refusing the application of the appellant, who claims to be a transferee of a one eighth share in a mortgage decree, to make him a party to the execution proceedings on the mortgage decree in substitution of, or jointly with, the

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decree-holder. The question has been raised whether any appeal lay to the High Court from the order in question.

In making that order the District Judge purported to act under O. 22, R. 10 of the Code of Civil Procedure and, as orders under that rule are appealable, we are bound to entertain the appeal as held in *Abdul Rahiman Saheb v. Ganiapathu Bhattu* ¹ and *Lakshmanan Chetty v. Ramanathan Chetty* ².

In dealing with the appeal it will be convenient to consider in the first place whether under the present Code a decree can be transferred in part, and if so, whether the part transferee can be made a party to pending execution proceedings and allowed to execute if the transferor who has obtained an order for execution forbears to execute; and secondly whether there has been a part transfer of the decree in this case, and if so, whether the part transferee, the petitioner, is debarred by the terms of the deed of transfer from executing the decree or intervening in the execution.

It was well settled under the Old Code that there could be part transfers of a decree. *Kishore Chand Bhakat v. Gisborne & Co.*, ³ and *Endoori Venkataramanial v. Venkatachalamulu* ⁴ and it was also settled that, one of several decree holders could transfer his interest, *Muthunarayana Reddi v. Balakrishna Reddi* ⁵. I do not find any sufficient indication in the new Code that it was intended to alter the law in this respect. On the contrary the present Code contains a new general S. 146 enacting that, save as otherwise provided by this Code or by any law for the time being in force, where any proceeding may be taken on application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him. This general provision is to take effect unless it is otherwise provided in the Code itself or by any law for the time being in force, and, even if it should be held that the part—transfer of a decree is not provided for in the rules, though it is not prohibited, that would not prevent due effect being given to such part transfers under this section itself which is wider than the rules if it can be read as authorising such a part transfer. The section should I think have a beneficial interpretation, and be read as

1. (1900) I. L. R. 23 Mad. 517.

2. (1904) I. L. R. 28 Mad. 127.

3. (1839) I. L. R. 17 Cal. 341

4. (1909) I. L. R. 33 Mad. 80.

5. (1896) I. L. R. 19 Mad. 306 : 6 M. L. J. 172

supplementing the rules, and, as a part transferee is a person claiming under a decree holder, I think it sufficiently authorises applications in execution by such a part transferee. Further S. 232 of the Old Code which was held to authorise such an application is reproduced in O. 21, R. 16, and the fact that the case of the interest of any decree-holder being transferred is now expressly provided for in the rule does not in my opinion show that part transfers are not covered by the rule, and still less that the rule prohibits an application by a part transferee of the decree so as to make S. 146 inapplicable. Reliance has also been placed for the appellant on O. 22, R. 10 (I) which provides that in other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the court, be continued by or against the person to or upon whom such interest has come or devolved. On the other hand it has been contended that this order does not apply to proceedings in execution. Generally an application for execution is a proceeding in a suit as held in *Virupakshappa v. Shidappa and Basappa* ¹ and *Shaik Davud Rowther v. Paramasami Pillai* ² and I think that the present Code has been drafted on this basis. It expressly provides by O. 22, R. 12, that nothing in Rr. 3, 4 and 8 of that order which provide for abatements, shall apply to execution, and in O. 23, R. 4 that nothing in that order shall apply to execution, while it contains no such provision in O. 32 as to minors or persons of unsound mind which, must none the less be equally applicable to execution.

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A further objection has been taken that an application in execution cannot be an application "during the pendency of a suit" within the meaning of O. 22, R. 10, but, if for the purposes of the order applications in execution are applications in suits, they must in my opinion equally for the purposes of the order be applications during the pendency of the suit.

I do not, however, desire to rest my decision on this point because in my opinion the terms of S. 146 are wide enough to enable the court to recognize part transfers of a decree.

Assuming that a decree may be transferred in part under the present Code, the next question is how is the part transferee to enforce his rights. He is much in the position of a joint

1. (1901) 1 L. R. 26 Bom, 109.

2. (1916) 31 M. L. J. 207.

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decree holder under O. 21, R. 15 but does not come within the words of that rule, as the decree has not been passed in favour of more persons than one. R. 15 provides that where the court allows one of several decree holders to execute, it shall make such provision as it may deem necessary for protecting the interests of persons who have not joined in the application. It must also, it seems to me, have jurisdiction to allow such other decree holders to intervene in a pending execution if it is not being properly conducted and must also have jurisdiction to allow a part transferee of the decree so to intervene, if, as alleged here, the executing decree holder is not duly prosecuting the execution. It would be a very unsatisfactory state of the law if a decree holder who has obtained valuable consideration for a part transfer of the decree were to be at liberty to abandon or delay the execution of the decree and defeat the right of the transferee.

These being the general questions of law arising in the case, the next question is whether the deed is a transfer of part of the decree. It recites that the decree holder has agreed to assign a one-eighth share of the decree amount together with the securities therefor and goes on to provide that in consideration of Rs. 2,89,000 he assigns "all that 1/8th share in the above said sum now owing on the said decree." This in my opinion is a clear assignment of 1/8th of the decree. There is a further assignment of one eighth share of the rents and profits of the mortgaged property which were in possession of the assignor decree holder as mortgagee, but these provisions do not affect the assignment of part of the decree.

Lastly, we have to consider the provision that the execution proceedings shall be carried on in the name of the said Mr. Lodd Govindoss (the transferor) as hereto-fore and the said Mr. Lodd Govindoss shall be at liberty to continue the execution petition No. 145 of 1905 in the District Court of North Arcot as Mr. Lodd Govindoss may think proper and Mr. Lodd Govindoss shall be at liberty to compromise the matter in the course of the said execution proceedings in any manner as he thinks proper. I am unable with great respect to agree with the conclusion of Oldfield, J. that these provisions show that it was intended not that there should be a part transfer of the decree, but only a transfer of a right to share in any sum that Lodd Govindoss might choose to recover under the decree. On

this question I entirely agree with the observations of Seshagiri Iyer, J. Assuming the appellant to be a part transferee of the decree, there remains the more difficult question as to the effect of the stipulation that the transferor is to continue the execution proceedings as he may think proper. Seshagiri Aiyar, J., was of opinion that these stipulations merely established a revocable agency which the appellant was at liberty to revoke. It has also been argued before us that, even if this be not so, and the stipulation goes further and prevents the appellant from intervening in the execution, it would be invalid as opposed to the provisions of S. 28 of the Indian Contract Act that "every agreement by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals" is void to that extent. If the stipulations in question have the effect of restricting the appellant absolutely from enforcing his rights in execution as a part transferee of the decree, I am of opinion that they are void under the section and are no bar to the entertainment of the present application if a proper case is made out.

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Subsequent to the transfer the transferor decree holder in my opinion is in the same position as a joint decree holder who has been allowed to execute under O. 21, R. 15. As I have already said, I think the other joint decree holders have a right to ask to be allowed to intervene at any stage of the execution if their interests are not adequately protected and I think that equally in the present case the appellant the part transferee should be allowed to intervene and even given the conduct of the execution proceedings if a proper case is made out. As the District Judge has not dealt with this aspect of the case I would allow the appeal, set aside the order and remand the case for disposal according to law in the light of the above observations. Costs to abide.

Spencer, J. :—I agree that the Judgment of Seshagiri Aiyar, J., who was for allowing the appeal against the District Judge's order refusing leave to the transferee, Muthiah Chetty to continue the pending execution proceedings in E. P. No. 145 of 1905 should be upheld in this Letters Patent Appeal.

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Oldfield, J., who differed from him, did so for three main reasons, which are (1) that in his opinion the appellant had not obtained a transfer of the decree (2) that the District Judge's exercise of discretion should not be interfered with and (3)

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that the Civil Procedure Code does not provide any procedure for allowing a transferee of a partial interest in a decree to carry on pending execution proceedings commenced by his transferor.

• On the first point he was of opinion that under the terms of the indenture the appellant obtained only the right to recover his share from the fund composed of realisations under the decree or the profits of management as that fund might come into existence.

Now the indenture provides for the assignment to the shareholder of "one-eighth share or 12½ per cent of the decree amount together with the securities therefor and the outstanding arrears of rents and profits as standing on the date of the agreement that may be realized."

A fund implies collections and its existence might be gathered from the creation of rules for its formation, its management, and the custody of cash belonging to it, but the indenture is singularly silent on such subjects. The arguments advanced by Mr. K. Bashyam Iyengar on behalf of the respondent, really amount to this, that there was a transfer of the debt without a transfer of the decree. That is an impossible position for as soon as the decree was passed the debt became merged in it and ceased to exist independently of it. I consider, that under the indenture there was a transfer of a fraction of the decree amount and of a further interest in the decree holder's right to enjoy the rents and profits from villages mortgaged to Lodd Govindoss.

I can see no objection to the assignee of a portion of a decree being allowed to come in and execute it on behalf of himself and his co-decree-holder under O. 21, R. 16 of the Code of Civil Procedure provided that the Court imposes under rule 16 such terms for the conduct of the execution proceedings as may be necessary for the protection of the interests of others, such as a direction for payment into court of sums realized under the decree. *Kishore Chand Bhakat v. Gisborne & Co.* ¹ *Muthu Narayana Reddi v. Balakrishna Reddi* ², *Endoori Venkataramaniah v. Venkatachalamulu* ³, *Gyamanee v. Radha Raman* ⁴, are decisions which support this view; and *Devar Buksh Sirkar v. Fatik Jali* ⁵, shows that no distinction should be made in this

1. (1889) I. L. R. 17 Cal. 341.

3. (1909) I. L. R. 33 Mad. 80.

2. (1896) I. L. R. 19 Mad. 305.

4. (1879) I. L. R. 5 Cal. 392.

5. (1898) I. L. R. 26 Cal. 250 at page 253.

connection between the institution of execution proceedings and the continuation of such proceedings already begun by the assignor decree holder which are still pending.

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On the second point I am of opinion that the transferee decree holder's right of execution should not have been made to depend upon the discretion of the Court (See *Asad Ali Mollah v. Haidar Ali* ¹, where the change of language between S. 232 of the Code of 1882 and Order 21, Rule 16 by the omission of the words "If that court thinks fit" is alluded to). The discretion of the court should be confined to laying down the conditions upon which execution should be allowed to proceed. There is no room for the exercise of the court's discretion otherwise. I further think that if the District Judge's grounds for the exercise of his discretion appear to be ill founded the appellate court should in any case interfere. We have here an assertion on oath by the appellant that the respondent, Lodd Govindoss, is improperly delaying execution, which has not been contradicted or shown to be false. I think that Lodd Govindoss was the agent of the appellant under the agreement for recovering what was due as the appellant's 1/8th share in the decree and the sale proceeds of the mortgaged properties, and that under Ss. 28 and 203 of the Contract Act, the appellant was at liberty to revoke the authority he gave in the indenture to his agent for carrying on execution proceedings in his own (agent's) name if he acted prejudicially to his (principal's) interest in respect of his one eighth share.

On the last point, the general provisions of S. 146 of the Code of Civil Procedure and the special provisions of O. 22, R. 10 as to devolution of interest during the pendency of a suit appear to be ample authority for permitting the assignee decree holder to continue the pending execution proceedings. Although O. 22 is headed Death, Marriage and Insolvency of parties, the use of the word assignment, in rule 10 implies that transfers of interest *inter vivo* are included.

The observation though obiter in *Midnapore Zemindari Co. Ltd., v. Naresh Narain Roy* ² that the express exclusion by R. 12 of the application of Rr. 3, 4, and 8 of O. 22 from execution proceedings implies that the remaining rules are applicable even in execution commends itself to my mind. In the

¹ (1910) I. L. R. 38 Cal 13 at p. 21.

² (1911) I. L. R. 39 Cal. 220 at p. 226.

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note to R. 12 in Amir Ali's Civil Procedure Code there is an observation to the same effect. The observation in *Sitaramaswami v. Lakshminarasinha*¹ that rule 10 would not apply to devolution of interest after the termination of the suit was one made with strict reference to an appeal. The learned judges held S. 146 would cover even appeals. I have already dealt with the objection that the assignment to the appellant was not of the decree holder's entire interest. The result is that the appeal succeeds and the case must go back to the District Judge for passing orders under O. 21, R. 15 (2) and 16 Costs to abide.

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Kumaraswami Sastri, J. :—This appeal arises out of a difference of opinion between Oldfield, J., and Seshagiri Aiyar, J., as to the right of the appellant who claims to be a transferee of part of a decree to come on record and to continue execution proceedings. The decree is a mortgage decree for 21,000 rupees passed in favour of the respondent's father who was a mortgagee in possession, on the 29th September 1903 in respect of which execution proceedings were filed by the decree holder on the 13th December 1905 and on the decree-holder's death continued by the respondent his son. On the 1st October 1917 the respondent executed an indenture in favour of the appellant which, appellant contends, transferred to him an eighth share in the amount secured by the decree for a consideration of 2,89,000 rupees and which respondent states was only an assignment of an eighth share of the sum that might be ultimately realised. The appellant on the strength of the deed applied to the District Court to be brought on record as assignee decree-holder and to execute the decree either in substitution of or jointly with the respondent. It was alleged that the respondent was conducting execution proceedings in a manner prejudicial to the appellant. The application was opposed by the respondent on the ground that he was not entitled to apply for the relief claimed. The District Judge held that there was a transfer of an eighth share in the decree but that appellant was not entitled to the relief claimed as the deed of transfer stipulated that execution proceedings were to be carried on by the respondent and that as there was a contract that he would not join in the execution proceedings. He did not go into the allegations made against

respondent but contented himself with stating that the holder of a 7/8th share would not act in a manner prejudicial to the appellant who had an eighth share only.

On appeal Oldfield, J., was of opinion that the appellant was not in law entitled to the relief he claimed while, Seshagiri Aiyar, J., took the contrary view. I agree with the view taken by Seshagiri Iyer J.

So far as the indenture dated the 1st October 1917 is concerned, I am of opinion that it is an assignment of an eighth share in the decree. This preamble distinctly states that Lodd Govindoss "has agreed to assign to the share-holder P. M. A. Muthiah Chettiar one eighth share or twelve and half per cent. of the decree amount together with the securities therefor and the outstanding arrears of the rents and profits as standing on this day that may be realised (according to the accounts of the taluq office) for a consideration of 2,89,000." The deed proceeds to state that in consideration of the said sum Lodd Govindoss assigned "all the one eighth share in the above said sum now owing on the said decree as hereinbefore mentioned and one-eighth share of the arrears of rents and profits now due and may be realised on the said decree and of all other securities for the said decree amount to which Mr. Lodd Govindoss may be entitled". The transfer was subject to certain conditions. Execution proceedings were to be carried on in the name of Lodd Govindoss as heretofore and he was at liberty to continue the execution proceedings in E. P. No. 145 of 1905 as he may think proper and be at liberty to enter into any compromise he thought fit. If the execution proceedings resulted in a sale the appellant was entitled to an eighth share of lands purchased by the decree-holder himself or to an eighth share in the sale proceeds if the lands were purchased by strangers. A private sale of the property comprised in the decree was to be made on consultation with Muthiah Chettiar the transferee. I think it is clear from the terms that what was transferred was an eighth share of the decree and not simply a right to share in the amount that might be realised, the transferee having no interest in the decree itself. The preamble is clear and refers to the transfer of an eighth share of the decree. The clause allowing the transferor to continue execution proceedings in his name and giving him power to compromise are explainable by the fact that the transferor retained 7/8th share in the decree.

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and wanted to secure a predominating right in realisation. If all that was transferred was only a share in the fund that might be ultimately realised nothing would have been easier than to have said so. The whole tenor of the document shows that it was the 1/8th share in the decree that was transferred.

I do not think there is anything in the provisions in the Civil Procedure Code prohibiting the transfer of a part of a decree. In *Kishen Chand Bhakat v. Gisborne and Co.*,¹ a decree-holder assigned a twelve annas share of the costs awarded to him and the transferee applied for the execution of the decree. It was contended on appeal that as the transferee purchased only a portion of the decree he had no right to be substituted in place of the decree holder and permitted to execute. It was held that there was no prohibition in the Civil Procedure Code against the transferee of a part of the decree executing the decree subject to any equities which the judgment-debtors may have against the original decree-holder and subject to the interest of the original decree-holders retained by them being safeguarded.

In *Muthu Narayana Reddi v. Balakrishna Reddi*² it was held that there was no prohibition against one of several decree holders assigning his interest in the decree and the assignee applying for execution. In *Endoori Venkataramanaiah v. Venkatachalamulu*³ a decree-holder who obtained a decree for maintenance transferred it in so far as it related to the arrears accrued due. It was held following *Kishen Chand Bhakat v. Gisborne and Co.*¹ and *Muthunarayana Reddi v. Balakrishna Reddi*² that the assignment of part of a decree was valid and the transferee of such part could execute the decree.

If a transferee of a part of the decree can apply to execute a decree he is equally entitled to apply to continue execution proceedings already instituted by his transferor. In *Dawar Buksh Sirkar v. Fati Jali*⁴ it was held that an assignee pending execution proceedings can continue the execution proceedings as there was nothing in the Code to prevent the Court from recognising the transferee as the person to go on with the execution in cases where there was an assignment pending execution proceedings. In fact to hold otherwise would lead to great

1. (1889) I. L. R. 17 Cal 341.

3 (1909) I. L. R. 33 Mad 80.

2. (1890) I. L. R. 19 Mad. 306.

4 (1898) I. L. R. 26 Cal. 250.

hardship and necessitate proceedings being commenced *de novo*. A fresh application may also be barred.

I see nothing in the present Code of Civil Procedure preventing a transferee of part of a decree from applying to the court to bring him on record in the execution proceedings and allowing him to execute the decree either along with or in substitution for the decree holder. S. 146 of the Code is very general and provides that, where proceedings may be taken or applications made by or against any person then the proceedings may be taken or the application may be made by, or against any person claiming under him. Order 21, Rule 15 provides for applications for execution by one or more joint decree holders in case where a decree has been passed jointly in favour of one or more persons. Rule 16 provides for the interest of any decree holder in the decree being transferred and empowers the court to execute the decree on the application of the transferee in the same manner and subject to the same conditions as if the application was made by such decree-holder.

If assignment of part of a decree is valid I do not see why the assignee should not apply to be allowed to execute the decree jointly with the decree-holder interested in the remainder on the analogy of a joint decree-holder applying for execution under R. 15. The words of S. 146 which are very general do not prohibit this and so long as there is nothing in O. 21, Rr. 15 and 16 cutting down the right, S. 151 will empower the court to grant relief by applying principles analogous to Rr. 15 and 16 and give him relief even assuming that the rules would not in terms apply. Where rights are conferred by the sections of the Code and no provision is made for a particular set of facts I think courts ought to apply the provisions of the rules which are nearest in point with such modifications as may be necessary and not refuse relief on the ground that the legislature has not made provision for a particular case though within the generality of a section of the Code. The object of S. 151 is to give such power to courts and to prevent a failure of justice. In cases of transfer of part of a decree pending execution I think the proper course is to allow the transferee to be brought on record in execution proceedings and to treat further proceedings as if it was a joint petition by the transferor and transferee. Even if R. 10, O. 22

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does not apply to execution proceedings owing to the rule referring to pending suits I do not see why the same principle should not be applied. During the pendency of the suit a transferee of the whole or any part of the interest of the plaintiff or one of the plaintiffs is entitled to be brought on record and there is no reason why a transferee pending execution proceedings should not be given similar relief especially as the transferee can only work out his rights by execution and a denial of the right simply because an execution petition by his transferor was pending would lead to grave hardship in case the transferor is negligent or hostile. The present Code gives the Court no discretion to allow a joint decree holder to come on record and execute the decree. It will of course be open to the court to give the conduct of the proceedings to such of the petitioners as it might think fit after taking proper steps to secure the interest of the others.

The legal right of the petitioner to join an execution proceeding being in my opinion clear the question is whether the terms of the deed of transfer in his favour preclude him from exercising the rights. The clause in the deed relied on runs as follows :—"That the execution proceeding shall be carried on in the name of the said Mr. Lodd Govindoss as before and that the said Mr. Lodd Govindoss Krishnadoss shall be at liberty to continue the execution petition No. 145 of 1095 in the District Court of North Arcot as Mr. Lodd Govindoss Krishnadoss may think proper and Mr. Lodd Krishnadoss Govindoss shall also be at liberty to compromise the matter in the course of the said execution proceedings in any manner as he thinks proper." I am of opinion that this clause does not amount to a negative covenant whereby the transferee precludes himself absolutely from having anything to do with execution proceedings under all contingencies. It merely amounts to an appointment of Lodd Govindoss as the transferee's agent to realise the amount under the decree. It is not an agency coupled with an interest as Lodd Govindoss had no lien, charge or other interest in the eighth share transferred to Muthiah Chettiar. His interest is only in the 7/8th share not transferred. An arrangement between co-owners whereby one person is empowered to do certain acts for the benefit of all of them would not make the agency one coupled with an interest so as to make it irrevocable if his conduct is prejudicial to the other

co-owners. The agreement that Mr. Lodd Govindoss was to continue the execution proceedings in his own name would no doubt be an important factor in determining who should be given the conduct of the execution proceedings, but I do not think it is an absolute bar to the transferee applying to be added as a party to the execution application in case he shows that he would be otherwise prejudiced. Even if the agency is one coupled with an interest there is nothing to prevent the principal from acting where the agent refuses to act or acts in a manner which is prejudicial to the interest of the principal especially when such a course, is not required to safeguard the agent's interests owing the conflict between the interests of the principal and agent. An agent coupled with an interest is as much bound to act *bona fide* and in the interests of his principal as any other agent. The clause giving Lodd Govindoss the absolute discretion to compromise would be unaffected by any orders bringing the petitioner on record in execution proceedings as there is nothing to prevent Lodd Govindoss from entering into a compromise. So long as there is no fraud or collusion the court will record the compromise and would disregard any objection of the transferee who under the deed of transfer in his favour has deprived himself of the right to object to *bona fide* compromise of the claims under the decree.

If the clause as to Lodd Govindoss continuing execution proceedings in his name amounts in law to an absolute prohibition of the transferee from executing, I think the clause would be invalid as falling under S. 28 of the Contract Act which renders every agreement by which a party thereto is restricted absolutely from enforcing his rights under or in respect of any contract by the usual legal proceedings in the ordinary tribunals void unless it can be brought under the exceptions to the section. The only way to realise by legal proceedings the fruits of a decree which has been transferred is by execution and when there has been an absolute transfer any direction that he shall not execute the decree under any circumstances would be a restriction repugnant to the interest created and so inoperative.

It was contended by appellant during the course of the argument that O. 22 R. 10 applied to execution proceedings and reference was made to the fact that rule 12 provides that nothing in rules 3, 4, and 8 shall apply to proceedings in

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execution of a decree or order thus making the other rules applicable. Reliance was placed on *Midnapore Zemindari Co. v. Naresh Narain Roy*¹ where Casperz and Sharfuddin JJ. observed "The present Code (Order 22 rule 12) seems to imply by the principle of exclusion that all the rules of that Order except rules 3,4 and 8 are applicable to proceedings in execution of a decree or order, and we are inclined to think that R. 10 is so made applicable." These observations were obiter as the learned Judges began by stating that as the case was one not in execution of a decree it was unnecessary to decide the point. Reliance has been placed by the respondent on the decisions passed under the corresponding section in the Act of 1882 and to *Manmotha Nath Mitter v. Rakhal Chandra Tewary*² and to *Sitaramaswami v. Lakshmi Narasimha*³ where it was held by Seshagiri Iyer and Napier JJ following *Subbu Pillai v. Rangaswamy*⁴ that O. 22 R. 10 does not apply to applications after the termination of the suit. I am of opinion that O. 22 R. 10 which expressly refers to assignments, creation or devolution of any interest during the pendency of a suit in terms excludes applications after a final decree has been passed. The words "pendency of a suit," mean the interval between the filing of a plaint and the passing of a final decree. It is no doubt true that applications for the execution of a decree are proceedings in the suit itself (*Virupakshappa v. Shidappa and Bassappa*⁵), but in order to bring the case within O. 22 R. 10 the application should be in a pending suit. I do not think that the fact that only Rs. 3,4 and 8 are referred to in R. 12 would make R. 10 applicable if the wording of the rule necessarily renders it inapplicable to execution proceedings. As a decree for any deficiency that may arise has been passed in the present case which was decided before the present Civil Procedure Code was passed it is unnecessary to consider if in mortgage suits the suit can under O. 34 of the present Civil Procedure Code be considered as pending till the last of the decrees contemplated by it has been passed.

It has been argued that if R. 10 does not apply there will be no appeal from the order of the District Judge to the High Court. As the District Judge purported to act under O. 22

1. (1911) I. L. R. 89 Oal, 220.

2. (1911) 14 Cal W. N. 752.

3. (1917) I. L. R. 41 Mad 510.

4. (1917) M. W. N 306.

5. (1907) I. L. R. 28 Bom 109.

R. 10 and rejected his application an appeal will lie even if the court thinks the rule inapplicable. In *Abdul Rahiman Sahib v. Ganapathi Bhattu* ¹ it was held by Sir Arnold White C. J. and Subramaniya Iyer J that the facts that the District Judge had no power to pass an order under a particular section does not bar this court from treating this order as having been passed there-under for the purposes of of entertaining an appeal against the order and reference was made to the decision of the Privy Council in *Hurriah Chunder Chowdhury v. Kali Sundari Debi* ². A similar view was taken in *Lakshmana Chetty v. Ramanathan Chetty* ³. The application is in substance one by a representative of the decree-holder to execute the decree and the relief claimed is against the judgment-debtor. The application is one to execute a decree. I do not think it matters from whom the objection proceeds. As the case falls under S. 47 of the Code the order is by virtue of the definition of decree in S. 2 appealable as a decree.

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The appellant has made several allegations to the effect that the respondent has been acting in a manner prejudicial to his interest. These allegations have not been gone into by the District Judge who disposed of the case on the ground that the appellant was precluded by the terms of the deed of assignment from making the application. The remark of the Judge that it is improbable that the respondent will act in a manner prejudicial to the recovery of the amount due under the decree as he has a predominating interest is hardly a finding on the facts alleged on a consideration of the evidence before him. As respondent is in possession and enjoying the rents and profits of the mortgaged property it may well be in his interests to delay execution as long as possible while he puts off the appellant's claims.

I would reverse the order of the District Judge and direct that the application of the petitioner be disposed of according to law in the light of the observations in the judgment. Costs to abide and follow the result.

C. A. S.

Appeal allowed and case remanded.

1. (1900) I. L. R. 23 Mad. 517

2. (1882) I. L. R. 9 Cal. 482,

3. (1904) I. L. R. 28 Mad. 127

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ABDUR RAHIM AND MR. JUSTICE ODGERS.

Rangachariar ... Appellant * (Plaintiff).

Doraswami Reddy and others ... Respondents (Defendants.)

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v.
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and others.

Madras Estates Land Act—S. 40—Commutation of rent—Basis of—Kanganam—Amount of—Deduction for—Proprietary—Lands in shrotriem village—Waram system, including payment of Kanganam, prevalent for long time—Effect.

In a suit for commutation of rent in regard to lands in a shrotriem village, in which the ryots had the occupancy holdings, and for which they had paid waram including the Kanganam, for a long time held that the lower courts were wrong in deducting from the total outturns of the various fields 4 p c. for Kanganam in order to arrive at the amount of yield on which the money rent was to be calculated.

Second Appeal against the decree of the District Court of Chingleput in A. S. No. 341 of 1918 preferred against the decree of the Court of the Sub-Collector of Chingleput Division in Summary Suit No. 251 of 1913.

T. V. Muthukrishnaier for appellants.

T. R. Ramachandraier and T. D. Srinivasachariar for respondents.

The court delivered the following

Judgment :—None of the grounds sought to be urged before us were raised in the Lower Appellant Court. Therefore the appeal is dismissed with costs.

MEMO OF OBJECTIONS.

Two points are raised by Mr. T. R. Ramachandra Iyer in his memorandum of objections in this case. The first is that the lower courts were wrong in allowing commutation at the rate of annas 4 only for the punja lands in question on the ground that plaintiff in his plaint admitted he was liable to pay Rs. 1-4-0 per acre. We are not inclined to allow this objection as we do not think the plaintiff did so admit his liability. He says in para 8 of the plaint that he has been paying Rs. 1-4-0 for A schedule lands and "cannot afford to pay more than the said rates with regard to B schedule lands also." This does not in our opinion amount to an admission that he is liable to pay Rs. 1-4-0 for B schedule lands. This objection is therefore dismissed.

The second objection is that the Lower Courts were wrong in deducting from the total outturns of the various fields

4 percent for kanganam, in order to arrive at the amount of yield on which the money rent was to be calculated.

Kanganam is a portion of the produce set aside for the landlord for his supervision at the time of division of the harvest. The plaintiff says he has been paying waram in respect of the suit lands for 30 and 40 years and he was presumably being paying the kanganam for a like period. Rent is defined by S. 3 (11) of the Madras Estates Land Act as "whatever is lawfully payable in money or in kind or in both to a landholder for the use or occupation of land." Rent also includes for the purpose of certain specified sections "any local tax, cess fee, or sum payable by a ryot as such in addition to the rent due in respect of land according to law or usage having the force of law, and commutation of rent payable in kind to a money rent is controlled by S. 40. S. 51 gives the contents of the patta and muchilika and includes the aforesaid tax, cess, fee etc., payable with the rent.

The learned vakil for the appellant argues that as the former rent in kind was only payable out of the balance of the out-turn after the kanganam has been divided and given over to the landlord, commutation must be confined to the amount or value of that balance. In other words the contention is that the average monetary value of the crop after deducting the kanganam is the money rent payable, on the ground that it is only the balance that has been paid as rent for use and occupation of the land. This I think involves a fallacy. The wording of S. 3 (11) is "lawfully payable" not what has been paid. Moreover this argument overlooks the fact that while the sharing system prevailed the portion of the produce constituting the Kanganam belonged exclusively to the Respondents and further if this is left out of account in assessing the money rent payable, there will be a portion of the produce of the land which is not assessed to rent, after the kanganam has ceased to be payable. This does not seem reasonable or right. The patta would under S. 51 contain the kanganam unless it was a mere voluntary payment. We have examined the record and the judgment in second appeals Nos. 2057 and 2066 of 1912 where Seshagiri Iyer and Kumaraswami Sastri JJ held that Kanganam in respect of Samudayam lands was not recoverable in a rent suit, as it was in reference to land of that character merely a voluntary payment. That was a case of communal

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lands, as stated paying a money rent, and kanganam being incident to a waram tenure was held not payable there being as pointed out by the collector, no necessity for any supervision at harvest in the case of those lands.

In the case before us, the village is a shrotriem village and the ryots have the occupancy holdings therein, and have been paying varam for a very long time past.

We do not think therefore that the unreported case has any bearing on the present and we would allow the contention of the respondents and vary the decrees below by directing the calculations to be revised by restoring the 4 p.c. deductions made on account of kanganam. We make no order for costs on the memorandum of objections.

Second Appeal dismissed.

Memorandum of objections allowed in part.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE SPENCER.

Mr. A. V. Balakrishna Menon, Offi-

cial Receiver, South Malabar. ... *Appellant * (Plaintiff.)*

v.

Thirunilai Grama Veeraraghavan

Pattar's children Rangan Pattar

(family manager) and others ... *Respondents (Defendants.)*

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Limitation Act Art. 11, 13, 62 and 120—Property of an insolvent under attachment—Application by an Official Receiver praying that property may be treated as vested in himself and as not available to the attaching creditor solely—Whether application one under O 21, R 58 to 63 or O. 38 R. 8—Suit to set aside the order—Article of the Limitation Act applicable—Money paid over to the attaching decree-holder—Suit to recover amount paid over—Limitation Act, Art. 62.

An application by an Official Receiver to the Court which had attached the property of an insolvent at the instance of a creditor praying that the property may be treated as property vested in the Official Receiver and as therefore not available to the attaching creditor to satisfy exclusively his claim under the decree is not an application falling under the terms of O 21, Rr 58 to 63 or under O 38, R. 8 or S. 78 of the Code of Civil Procedure and an order on such application does not require to be set aside by a suit brought within one year thereof under Art. 11 or 13 of the Limitation Act.

Ganga Din v. Khushali (1) doubted.

Art. 13 of the Limitation Act does not apply to cases of suits to set aside orders passed on miscellaneous applications in the course of execution proceedings, (which are proceedings in suits)

Kishori Lal v. Kubar Singh (2) not followed.

* Appeal No. 208 of 1920.

11-5-1921.

1. (1885) I. L. R. 7 All. 702.

2. (1910) I. L. R. 8 All. 93.

A suit to set aside an order on the above application by the Official Receiver can be brought within six years from the date of the order under Art. 120 of the Limitation Act.

If subsequent to the Official Receiver's application the money was paid over to the attaching decree-holder, the Official Receiver is entitled to bring a suit to recover that money as money had and received by the decree-holder for the use of the Official Receiver, and the limitation for such a suit is three years under Art. 62 of the Limitation Act.

Appeal against the decree of the Court of the Subordinate Judge of South Malabar at Palghat, in original suit No. 58 of 1918.

T. R. Ramachandra Aiyar and P. S. Narayanaswamy Aiyar for Appellant.

A. Krishnaswamy Iyer for 2nd Repondent.

P. V. Parameswara Aiyar and C. S. Swaminadhan for 1st and 3rd Respondents.

The Court delivered the following

Judgments :—*Sadasiva Aiyar, J.*:—The first question in this case is whether an application by an Official Receiver to a court which had attached the property of an insolvent at the instance of a creditor, praying that the property may be treated as property vested in the Official Receiver and as therefore not available to the attaching creditor to satisfy exclusively his claim under the decree, whether such an application is a claim petition which falls within the class of claims and objections dealt with by O. 21, R. 58 to 63, and under O. 38 R. 8 (Claim preferred to property attached before judgment) or is an application *sui juris* not governed by those sections. In the case before us, the property was attached before judgment and the adjudication was after the attachment. It has now been settled in this court by the Full Bench decision in *Prasada Nayudu v. Virayya* ¹, overruling the decision in *Ramanamma v. Kamaraju* ², that, notwithstanding the very vague and wide terms of O. 38, R. 8 and notwithstanding that O. 21, R. 63 has not been expressly extended to orders made on claim petitions preferred to properties attached before judgment, all the provisions of O. 21, Rr. 58 to 63 (old Ss. 278 to 283) must be held to have been impliedly incorporated in the rules in O. 38 relating to attachment before judgment. If therefore the claim by the Official Receiver, in whom the insolvent's property has become vested after the attachment, does not fall within the class of claims governed by O. 21. Rr 58 to 63, it may

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1. (1918) I. L. R. 41 Mad. 849.

2. (1917) I. L. R. 41 Mad. 23.

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be taken that it is not also a claim falling to be dealt with under O. 38, R. 8 where the attachment was before judgment.

If the property has vested in the official Receiver before the attachment, I have no doubt that the claim made by him for the release of that property falls within O. 21, R. 58, but if the adjudication is after the attachment, he cannot attack the attachment itself as having been invalid or improper on the date when it was affected. All that he could do is to contend on the strength of S. 34 cl. I of Act 3 of 1907 (S. 51 of the Provincial Insolvency Act of 1920) and S. 16, cl. 2 (a) of Act 3 of 1907 that the decree holder's right to proceed in execution against the attached property had come to an end on the date of the order of adjudication with effect from which date the property vests in the Official Receiver. As stated in *Govinda Das v. Karan Singh*¹ "Upon the adjudication in insolvency, the attachment ceased to have any effect. All the property of the insolvent vested in the Receiver." O. 21, R. 58 applies to a claim made on the ground that the property is not liable to attachment. O. 21, R. 59 says: "The claimant must adduce evidence to show that at the date of the attachment he had some interest in, or was possessed of, the property attached." O. 21, R. 60 says that "Where the court is satisfied that the property was not, when attached, in the possession of the judgment-debtor etc. the court shall make an order releasing the property etc." O. 21, R. 61 says: "Where the court is satisfied that the property was, at the time it was attached, in the possession of the judgment-debtor etc., it shall disallow the claim." Then O. 21, R. 63 is enacted making it necessary that a suit by the unsuccessful party has to be brought to nullify the order passed on a claim to which the previous rules apply as that order is conclusive subject to the result of the suit. We have then Article 11 of the Limitation Act which prescribes a period of one year for the suit contemplated in O. 21 R. 63.

The Official Receiver in whom the property vested only after attachment cannot make a claim on the ground that the property was not liable to attachment on the date it was attached. He cannot adduce evidence to show that at the date of the attachment, he had an interest in, or was possessed of, the property attached, and the court cannot in the language of O. 21, Rr. 60 and 61 decide in favour of the Official Receiver

¹. (1917) I. L. R. 40 All. 197.

on the ground that the "property was not, when attached" the judgment debtor's property, or decide against him on the ground that "at the time it was attached," it belonged to the judgment debtor. In fact the Official Receiver's claim (when the vesting in him was after attachment is a statutory claim which he is entitled to make under S. 34 of the Provincial Insolvency Act (III of 1907) and not a claim based on the circumstances contemplated in O. 21, Rr. 53 to 63. The claim of the Official receiver should be dealt with therefore by the court under its inherent powers under S. 151 of the Civil Procedure Code, and not under O. 21. In *Ganga Din v. Khushali*¹ and in the other cases cited, the question whether a claim by an official receiver in whom the property became vested after the date of attachment fell under Ss. 278 to 283 was not directly raised; the official receiver himself seems to have filed his petition as one falling under those special sections of the Civil Procedure Code and the Court dealt with the cases on that footing and decided in favour of the official receiver even on that footing. But in this case, the official receiver is sought to be defeated by holding up Art. 11 of the Limitation Act as a defence against the suit brought by him on failure of his claim petition. I am clear, for the reasons above given that his claim would not fall under the claim chapters of the Civil Procedure Code. The order dismissing his claim was not, therefore, one passed under the provisions of Rule 60 or 61 and O. 21 R. 63 therefore does not make the order passed against him "conclusive". It follows that article 11 also does not apply. It was held by this court in this very case on an appeal from the order dismissing the official receiver's claim that no appeal lay from the said order and that his remedy lay in a suit to obtain the money which remained in the attaching court and which had become vested in him. If, in the meanwhile, the money has been paid over to the attaching decree-holder, the official receiver has got his Common Law remedy of covering that money as money had and received by the decree-holder for the use of the Official Receiver, and the limitation for the suit is three years. As the money was paid to the decree-holder (1st defendant) only in December 1915 and the present suit was brought in November 1918, the suit is clearly

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1. (1885) 1. L. R. 7 All. 702.

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within time under Article 62. It was, however, argued that though the one year's limitation under article 11 may not apply, the one year's limitation under article 13 might apply. Art. 13 relates to a suit to alter or set aside a decision or order of a Civil Court in any proceeding other than a suit. Assuming that the order of December 1915 against the Official Receiver has to be set aside, it was not an order in a proceeding other than a suit. The decision in *Shankar Sarup v. Mejo Mal* ¹ clearly says that Article 13 does not apply to proceedings in suits, in other words, it relates to orders passed in disputes which did not begin with the filing of a plaint in a suit, such as disputes initiated by applications under Guardian and Wards Act, the Succession Certificate Act and so on, such applications and the proceedings connected with such applications being not proceedings in suits. Their Lordships therefore held that orders passed in miscellaneous applications in the course of execution proceedings (which are proceedings in suits) are not governed by Article 13. I respectfully dissent from the observations in *Kishori Lal v. Kuber Singh* ² holding that Article 13 applies to orders made in proceedings in execution in a suit. The learned judges of the Allahabad High Court construed the Privy Council decision in *Sankar Sarup v. Mejo Mal* ¹ as based on the ground that an order for rateable distribution need not be set aside by a suit and therefore Article 13 did not apply to a suit brought to enforce rights in contravention of that order. Their Lordships of the Privy Council however clearly say at page 323 that they "concur in the further observation made by the learned judge in that case" (that is the case *Vishnu Bhikaji Phadke v. Achut Jagannath Ghata* ³, "that the application of the 13th Article is also precluded by the fact that the order for distribution was a step in an execution proceeding and was therefore made in the suit in which the decree was made which was in process of execution. The order for distribution was thus an order in a suit." To set aside that order, therefore, a suit can be brought within 6 years under the general Article 120 as it is not governed by Article 13.

In the result, I would reverse the lower court's judgment and give a decree for the plaintiff for Rs. 7,310 (claimed) with

1. (1901) I. L. R. 28 All 813. (P. C.) 2. (1910) I. L. R. 33 All. 98.

3. (1890) I. L. R. 15 Bom. 438.

interest at 6 per cent. per annum from the 21st December 1915, till recovery and proportionate costs throughout on Rs. 8,600 in both courts against the defendants. The memorandum of objections is dismissed.

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Spencer, J. :—The plaintiff is the Official Receiver of South Malabar, and his suit having been dismissed as time barred he appeals. The lower court held that Article 11 of the 1st schedule to the Indian Limitation Act applied to this suit and that as it was not instituted within one year of the Sub-Judge's order of December 21st, 1915, it was out of time. There is no limitation for a receiver in insolvency obtaining possession of the Insolvent's property, which vests in him by S. 18 (1) of the Provincial Insolvency Act, at any time between the date of the making of an order of adjudication and the date of its being annulled.

Although the Bombay and Allahabad High Court have treated applications to take possession of estates when made by Official Assignees and Administrators General as being in substance claims under S. 278 of the Civil Procedure Code of 1882 even though started by a judge's summons or an ordinary motion, vide *Kashi Prasad v. Miller* ¹ *Charles Agnew Turner v. Pestonji Fardungi* ² *Sardarmal v. Arawoyal Sabapathy* ³ and *Bhabaji Bhimji v. The Administrator-General, Bombay* ⁴ and although in this court where the money was under attachment the Official Assignee's application has been termed in the note to the judgment a "claim petition" (*Krishnaswami Mudaliar v. Official Assignee of Madras* ⁵ yet as an Official Receiver is an officer of the court, the semi official act of this receiver in asking the court to issue a cheque for the money of the insolvent in court deposit bears little or no resemblance to the act of a stranger who prefers a claim to property attached in execution of a decree on the ground that such property is not liable to attachment. Ordinarily the intervention of the court in aiding an Official Receiver to obtain delivery of the insolvent's property would be undertaken in exercise of its powers under S. 18 (3) or S. 35 of the Provincial Insolvency Act (III of 1907). But the Official Receiver's application in this case was not made to a court exercising jurisdiction but to the sub-court

1. (1886) 7 All. 762

2. (1895) I. L. R. 20 Bom. 403.

3. (1896) I. L. R. 21 Bom. 205.

4. (1898) I. L. R. 23 Bom. 428

5. (1903) I. L. R. 26 Mad. 673.

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which had jurisdiction to deal with application to execute the decree in C. S. 23 of 1912 passed by the Temporary Sub-Court of Palghat. There was also an application by Rangan Pattar (1st respondent here and receiver in C. S. 23 of 1912) to pay the money out to the plaintiffs in that suit and it came on for disposal simultaneously with the Official Receiver's application. Both applications were treated by the sub-Judge of Palghat and by this court in appeal as miscellaneous petitions in execution and dealt with under S. 47, C. P. C. In the lower Court it seems to have been contended in this suit that the Official Receiver's petition was an application for rateable distribution under S. 73.

I am of opinion that it was neither a claim to property attached under O. 21 R. 53 nor an application for rateable distribution under S. 73. The Official Receiver was therefore not bound to institute a suit within one year, and his suit is not barred under Art. 11 of the Limitation Act. Neither is it barred under Art. 13 seeing that the Subordinate Judge's order of December 21st, 1915 was a proceeding in a suit.

This is the only point arising in the appeal. As it must be found in the appellant's favour, the decree of the lower court is set aside and the plaintiff will get a decree for the amount of Rs. 7,310 with interest at 6 per cent. from 21st December 1915, the date when the cause of action arose till realisation and costs as stated in my learned brother's judgment in this and the lower court.

C A. S.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SADASIVA AIYAR AND
MR. JUSTICE SPENCER.

M. Naga Rajah

... *Appellant* * (*Plaintiff*.)

v.

Deva Raja Karnanthaya Bellala ... *Respondent* (*Defendant*).

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Rajah
v.
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Karnanthaya
Bellala

South Canara—Pattams—Nature of—Claim for maintenance of junior members of Aliyasantana family out of pattam properties—Conversion of pattam property into family property—Legality of.

Junior members of an Aliyasantana family to which a *pattam* holder belongs have no interest in the *pattam* properties and cannot claim to be maintained out of the income of such properties.

Per Sadasiva Iyer, J.—A *pattam* in South Canara is in some respects analogous to the *stanom* in Malabar. But unlike a *stanom*, it is not a mere dignity

to which no obligations or duties are attached. It partakes of the nature of an office to which the villagers appoint after elaborate ceremony a member of the Aliyasanthana family to which the last holder belonged and if none such exists, anybody they like. The duties of the office are defined and entail expenses out of the income derived from the pattam properties.

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Per Spencer, J.—An appropriation or conversion for private purposes of properties attached to the pattam office is illegal.

Yasim Saheb v Ekambara Iyer 1 Referred to,

Appeal against the decree of the Court of the Subordinate Judge of South Kanara in O. S. No. 21 of 1917.

B. Sitarama Rao for appellant.

K. Yegnanarayana Adiga for respondent.

The Court delivered the following

Judgments :—*Sadasiva Aiyer, J.*—The plaintiff is the appellant. He brought this suit for maintenance against his brother, the defendant on the ground that both parties belonged to an Aliyasanthana family and that the defendant was in possession of the family properties as Yejman of the family and failed to give him maintenance. The defendant contended that he was not in possession of any property as Yejman of the family but only of certain properties as the person appointed by the Kulur Magane community to the Pattam of Kulur Bidu. The second issue raised was "whether the suit properties belong to the Aliyasanthana family of which the defendant is Yejman or to Kulur Bidu Pattam as alleged by the defendant."

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At the trial, the plaintiff seems to have argued that, though the properties belonged to the Kulur Bidu Pattam, the Pattam itself belonged to the family, and hence the properties also belonged to the family; and for this contention he relied upon the *Vyavasta Patra*, Ex. A, dated 1899, executed between the defendant and the father of the plaintiff and of the defendant who was the previous pattamdar. This document, according to the plaintiff made both the pattam and the property attached to it the family property of the plaintiff's mother's branch of their Aliyasanthana family. This pattam right has to be conferred by the Maghava villagers though they are bound by custom to bestow it upon a member of the Aliyasanthana family to which the last holder belonged; and

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on the non-existence of any such member, they can bestow it on anybody they like. This pattam is indeed in some respects analogous to the stanam in Malabar. But from the evidence it appears that it is not (like a stanam) a mere dignity to which no obligations or duties are attached. On the other hand, the plaintiff himself in his evidence as Plaintiff's witness No. 1 says "My father resigned the Kulur Bidu Pattam as he could not attend to the ceremonies there—the three ceremonies I have mentioned above ;" than he says in another place "There are annual ceremonies to be performed by the pattam holder—Mahalaya, Kambla and Puddarada mechi nema." Then he says as regards the "nema" ceremony, "The nema ceremony lasts 3 days. All the Maghava people have to be invited for the ceremony." It appears from the defence evidence that several other ceremonies,—Ashtami, Vinayaka Chathurthi and others, have also to be performed by the pattam office-holder at some expense. The villagers who installed the pattam-holder in his office have to be invited and fed, or at least given cocoanuts according to the evidence. Thus, whereas the stani succeeds to the stanom by reason of his being the next eldest member of the family next to the deceased stantee, that is not the case with this pattam dignity which rather partakes of the nature of an office to which the villagers appoint a man after an elaborate ceremony and the duties of which office are defined and entail expense out of the income derived from the lands forming the emoluments of the office.

As I said, the plaintiff admits that his father resigned the office because he was unable to perform the duties attached to it. That was in 1894 ; and the defendant was appointed to the office at once during his father's life-time.

The next question is whether junior members of the family of the pattam-holder can claim maintenance out of the income of the pattam lands. As I said, the holder of a pattam is in a less advantageous position than the holder of a stanam so far as his rights are concerned in the properties attached to the pattam. So far as the holder of a stanam is concerned, he becomes cut off for the time being from connection with his main tarwad ; the other members of his tarwad have no right whatever to or in the stanam properties. It seems to me that *a fortiori* the plaintiff cannot claim any interest in the pattam properties and it follows that he has no right to get maintenance out of the

income of the properties. But it was argued that by reason of the arrangement, agreement or settlement under Ex. A, dated 1899, the defendant became liable to treat these properties as his Aliyasanthana family properties and hence, the plaintiff was entitled to claim maintenance out of their income. One answer advanced against this contention by Mr. Adiga (for the respondent) was that, as religious duties were attached to the office, the properties cannot lawfully be made the subject of any agreement by the holder of the office changing their nature so as to allow secular rights of maintenance to be claimed out of their income. Abdur Rahim, J. and myself, in a case decided at the end of last year, C. M. S. A. No. 21 of 1920, differed on the question whether the properties attached to a religious office can be attached and can form the subject of alienation by court sale or private sale provided the service continues to be performed, and whether the alienation would be valid during the life-time of the office holder (judgment debtor or alienor). The decision in that case has been appealed against under the Letters Patent.

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Assuming however that even though the office of pattam has religious duties attached to it, and the properties can be alienated so as to be effective during the life-time of the office holder, the next question is whether Ex. A was intended to effect such an alienation. Mr. Adiga argued that it was not so intended even according to its terms, though the Subordinate Judge was of opinion that it was intended thereby to so convert the pattam property into family property. There is much to be said in favour Mr. Adiga's contention as the pattam and the properties are treated alike as intended to be held *in the joint family right of the heirs of the defendant according to the Aliyasanthana Law* of inheritance in the branch of the defendant's mother. It is difficult to believe that the pattam which belonged and could belong to one member of the family at a time was itself intended to be made the common property of the family. If so, the property attached to it which cannot be separated from it could not have been intended to be enjoyed as family property while the pattam can only be enjoyed by one member whom the Maghava Villagers appoint to the office. Then the provision of the agreement, 'Ex. A' that so far as the acquisitions but of the income are concerned they should be treated as family properties would be unnecessary if the

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provision in the former portion already set out was intended to convert the pattam and the properties into family properties. The true construction of Ex. A on this point is, however, not free from difficulty. I shall consider the case therefore on the footing that Ex. A was intended to convert the properties into Aliyasanthana family properties and not merely to regulate the succession to the pattam so as to preserve it and the enjoyment of the attached properties in the Aliyasanthana family. I shall here dispose of another minor contention of the appellant that item 1 alone was attached to the pattam and that items 2 and 3 were not attached to the pattam. I think the matter is concluded against the appellant's contention by the very document Ex. A which describes all the three properties as belonging to the pattam. Further the same contention was raised by the junior members of the previous pattam office holder in 1849 and was negatived—See Exs. B and C.

Then we have to consider the question whether Ex. A can be treated as an alienation by way of settlement or sale in favour of the family by the defendant. So far as sale is concerned, the consideration mentioned in Ex. A has been found to be clearly fictitious; for the wife's family is not a party to the deed, as the plaintiff's and the defendant's father who professes to have entered into the transaction in the interests of his wife's family is not according to law a member of his wife's family at all. Secondly taking it as an unilateral deed of settlement by the defendant in favour of his mother's Aliyasanthana family, I think that there is sufficient internal evidence in the recitals of the document itself which support the evidence of the defendant that he executed the document not by his free will and consent but owing to the undue influence brought to bear upon him by his father.

I therefore agree with the Lower Court's finding that this deed was not voluntarily executed by the defendant and that he could impeach its validity as a defendant.

In the result I would dismiss the appeal with costs.

Spencer, J.—The learned Subordinate Judge has found on the second issue that the suit properties appertained to the Kolur Bidu Pattam and not to the Aliyasanthana family of which the defendant is the Yejman. In support of the finding he relies on a good deal of documentary and oral evidence to

which we have been referred in the arguments in appeals. I have no doubt he was right in his conclusion that the properties appertained to the pattam.

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The argument advanced for the appellant that the pattam belongs to the family is negatived by previous history referred to in the Lower Court's judgment and in the judgments in the litigations of 1851, Exs. B, C and I. That history contains instances where the Maghava villagers have installed pattam holders selected from the family of the last pattam holder and failing lineal heirs in that family, have appointed persons from outside the family.

The appellant relies on Ex. A, a document signed by the defendant and his father at the time when the defendant succeeded to the office. Mr. B. Sitarama Row argued that this agreement or settlement gave his client a good title at least for the life-time of the defendant, and that it was too late for the respondent to repudiate it as being executed under undue influence as he did not set up such a case at the trial. The Subordinate Judge treated this Ex. A as a purchase of membership in the pattam family and he held that it was invalid for want of consideration. The document itself is termed a deed of settlement. Whether it is an agreement or a family settlement its purpose is clearly to appropriate for family purposes the property which belongs absolutely to the pattam and to alter the recognised custom of the trust under which the property had hitherto been enjoyed and managed. It states that "the extra immoveable and moveable properties belong to the self-acquisition of the pattam holder and should be carried on under the joint permission of the family of those who acquired the same; it should not be subjected to the power of the pattam holder." In another place the defendant and the persons who are his heirs are declared to have a right of inheriting the property as joint heirs of all his rights and interests according to the Aliya-santhana Law. As the Subordinate Judge observed, this document evidences an intention on the part of the defendant's father to create rights to the pattam and properties in all his children and to convert the pattam properties into family properties. An appropriation for private purposes of properties attached to a religious office is clearly illegal and even a trustee

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who mortgages the trust property for his own purposes can subsequently as a trustee impeach the validity of the transaction and avoid the alienations in the interests of the trust, as we held in *Yasim Sahib v. Ekambara Iyer* ¹.

I am therefore of opinion that Ex. A is not valid even for the life-time of the defendant and that the defendant is not now estopped from repudiating the validity of that transaction. The lower Court's decision is right and the appeal must be dismissed with costs.

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PRIVY COUNCIL.

PRESENT :—LORD BUCKMASTER, LORD DUNEDIN, LORD SHAW AND MR. AMEER ALI.

[On appeal from The High Court of Judicature at Madras.]

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Limitation Act of 1908—Art 134—Meaning and applicability—"Conveyed in trust"—"Trustee"—"Valuable Consideration"—Meaning—Limitation Act—S. 10—Effect—Hindu Law—Religious institution—Mutt—Property granted for general purposes of—Permanent lease by head of mutt on small quit-rent—Lease not for necessity—Validity—Suit by succeeding head to recover property—Limitation—Adverse Possession—Articles 134, 144 of Limitation Act,—Effect—Continuance of tenancy by succeeding head of mutt—Right of—Effect—Hindu and Mahomedan religious and charitable institutions—Laws relating to—English Law—Legal Conceptions of—Applicability—Mutts—Origin, development and raison d'être of—Superior of Mutt—Position in relation to its endowment—Religious institutions.—Manager of—Powers of—Inam proceedings—Object of—Entry in Inam Register as to purpose of dedication—Evidentiary value of—Gifts made long before Inam proceedings—Effect.

S. 10 controls Art. 134 of the Limitation Act of 1908, and gives the clue to the meaning and applicability of that Article. It clearly shows that the Article refers to cases of specific trust and relates to property "conveyed in trust." Neither under the Hindu Law nor in the Mahomedan system is any property "conveyed" to a shebait or a muttawalli, in the case of a dedication; nor is any property vested in him. Whatever property he holds for the idol or the institution he holds as

manager with certain beneficial interest regulated by custom and usage. *Prima facie* an alienation by a manager or superior by whatever name called of a Hindu or Mahomedan pious institution cannot be treated as the act of a "trustee" to whom property has been "conveyed in trust" and who by virtue thereof has the capacity vested in him which is possessed by a "trustee" in the English Law. Of course, a Hindu or Mahomedan may "convey in trust" a specific property to a particular individual for a specific and definite purpose, and place himself expressly under the English law when the person to whom the legal ownership is transferred would become a trustee in the specific sense of the term "conveyed in trust" is, however, hardly the right expression to apply to gifts of lands or other property for the general purposes of a Hindu religious or pious institution. There is, under the Hindu and Mahomedan law, a distinction between a specific trust and a trust for general pious or religious purposes.

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On 17th March 1891, Srinivasa, the then head of a mutt, granted to the 2nd plaintiff, a permanent lease of certain lands granted for the general purposes of the institution, on a small quit rent of Rs. 24 a year. Shortly after the grant of the lease Srinivasa died, and was succeeded by one Samudra who held the office until 1906. On his death the 26th defendant became the head. In 1902 the 2nd plaintiff sub-leased the lands to defendants 1 and 2 for a period of 10 years. During the currency of their term defendants 1 and 2, however, obtained a lease for 17 years from the authorised agent of the 26th defendant, the head of the mutt for the time being, and continued in possession of the lands under that lease. On 5th March 1913, the 2nd plaintiff, the 3rd plaintiff, the son of the 2nd, and the 1st plaintiff, an assignee from the 2nd and 3rd plaintiffs of their right and interest in the lands, instituted a suit, *inter alia*, against defendants 1 and 2, and the 26th defendant, the object of which was to eject defendants 1 and 2 who held under a title proceeding from defendant No. 26, and to upset the act of his administration on the ground of rights acquired adversely to the Mutt by lapse of time during the incumbency of Samudra. It was found that there was no justifiable necessity for the grant of the permanent lease to the 2nd plaintiff.

Held that Srinivasa was not a "trustee" and that all his successors were not "trustees", that the lands were not granted on a "specific" trust, and that consequently plaintiffs had not acquired a good title against the Mutt under Art. 134 of the 2nd Schedule of the Indian Limitation Act of 1908.

Held further that "valuable consideration" formed the essence of both S. 10 of the Limitation Act and of Art. 134 of the 2nd Schedule, and that, even if the case were one of a specific trust, the rent reserved in the grant to the 2nd plaintiff could not be held to be "valuable consideration".

Held also that the 2nd plaintiff had not acquired a title by 12 years adverse possession under Article 144, because (1) according to the settled law of India a Mohunt is, in the absence of justifiable necessity, incompetent to create any interest in respect of the Mutt property to endure beyond his life and the lease to the 2nd plaintiff could endure only for the grantor's (Srinivasa's) life-time, (2) it was open to Samudra, the successor, to continue the tenancy of the 2nd plaintiff during his (Samudra's) life, and, from the circumstances that Samudra permitted the plaintiff to continue in possession and received the rent during his life with the knowledge that 2nd plaintiff's tenancy ended with Srinivasa's life, the proper inference was that the tenancy was so continued and consequently the possession of plaintiff never became adverse until Samudra's death, and (3) even from before 1912 the lands were held by defendants 1 and 2 under a direct lease from defendant No. 26, the Matadhipati for the time being.

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There are two systems of law in force in India, the Hindu and Mahomedan systems, both self-contained and both wholly independent of each other, and wholly independent of foreign and outside legal conceptions. In each there are well-recognised rules relating to their religious and charitable institutions. It would be a serious inroad into the rights of Hindus and Mahomedans to be governed by their laws and customs so far as they are not in conflict with the statutory laws, if the rules of the Hindu and Mahomedan laws, were to be construed with the light of legal conceptions borrowed from abroad, unless perhaps where they are absolutely, so to speak, in *pari materia*.

Vice of method of construction by analogy illustrated in the case of 27 M. 435.

A "trust" in the sense in which the expression is used in English law, is unknown in the Hindu system, pure and simple.

Under the Hindu law the image of a deity of the Hindu pantheon is a "Juristic entity", vested with the capacity of receiving gifts and holding property. Religious institutions, known under different names, are regarded as possessing the same "juristic" capacity, and gifts to are made to them *co nomine*. In many cases in southern India, colleges and monasteries under the names of Mutt were found under spiritual teachers of recognised sanctity. These men had and have ample discretion in the application of the funds of the institution, but always subject to certain obligations and duties, equally governed by custom and usage. When the gift is directly to an idol or a temple, the seisin to complete the gift is necessarily effected by human agency. Called by whatever name, he is only the manager and custodian of the idol or the institution. In almost every case he is given the right to a part of the usufruct, the mode of enjoyment and the amount of the usufruct depending again on usage and custom. In no case was the property conveyed to or vested in him, nor is he a "trustee" in the English sense of the term, although in view of the obligations and duties resting on him, he is answerable as a trustee in the general sense formal administration.

Discussion of case—law relating to the position of the superior of a Mutt in relation to its endowment and to the powers of the managers of religious institutions generally.

The Inam proceedings were instituted simply with the object of investigating titles to hold lands revenue-free as belonging to valid endowments. The inam proceedings did not create any dedication. In the case of gifts made long before the inam proceedings by the Hindu Kings or chiefs who then held the country, the purpose of the dedication must be gathered from established usage and practice. Where the evidence in the case showed that an endowment was held for the general purposes of a Mutt, an entry in the Inam Register that the dedication was for a specific purpose, viz., the worship of the idol. Held not to avail the party relying upon it for showing that the dedication was for a specific purpose.

Appeal from a Judgment and Decree of the High Court of Judicature at Madras dated 19th October 1916, against the judgment and decree of the Subordinate Judge of Ramnad at Madura in O. S. No. 61 of 1914.

For a full report of the High Court Judgment. See 32 M. L. J. 24.

Clausen K. C. and Kenworthy Brown for the appellant.

De Gruyther, K. C. and K. V. L. Narasimham for respondents.

Judgment of The Lords of the Judicial Committee of the Privy Council, was delivered on 5th July 1921 by

Mr. Ameer Ali:—The suit that has given rise to this appeal relates to certain lands lying in the town of Madura in the Madras Presidency which admittedly belong to an old Mutt (Math) situated within the Mysore State. The origin, development, and *raison d'être* of these Mutts have been discussed in a number of cases decided in the Madras High Court to some of which their Lordships propose to refer in the course of this judgment. In their general characteristics they are almost identical with similar institutions in Northern India and in the Bombay Presidency. The heads of these foundations bear different designations in respect of the rights and incidents attached to the office; the difference arises from the customs and usages of each institution. The superior of this particular Mutt has been called in these proceedings Matathipathe and sometimes Pandara Sannathi, which their Lordships understand connote the same idea of headship. At the time this action was brought, the 26th defendant held the office of Matathipathe. He has since died and the present appellant is the head of the institution. In 1891 one Srinivasa was the Matathipathe and he on the 17th March of that year granted to the 2nd plaintiff, a near relative, a permanent lease of the lands in suit, on a small quit-rent of Rs. 24 a year. Shortly after the grant of the lease Srinivasa died, and was succeeded by once Samudra, who held the office until 1906. On his death the now deceased defendant No. 26 became the head. In 1902 the 2nd plaintiff sub-leased the lands to the 1st and 2nd defendants for a period of ten years.

Since 1905 the Mutt has been under the management of the Mysore State under a power of attorney, executed at first by the Matathipathe Samudra and afterwards by his successor, in favour of the Dewan and his successors in office. About the same time the 2nd plaintiff conjointly with his son (the 3rd plaintiff) assigned their right and interest in the lands in suit to the 1st plaintiff. It is in evidence and, so far as appears from the judgments of the two Courts in India, does not appear to be contradicted, that it was only in 1908 that the representative of the Dewan acting under the power granted by the Matathipathe became aware of the transaction of 1891 under which the plaintiffs claim title. The sub-lease created in 1902

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by the 2nd plaintiff in favour of the 1st and 2nd defendants was to have expired in 1912. But before its expiry they obtained a lease for 17 years from the representative of the Dewan. They are now in possession of the lands in suit under this lease. The plaintiffs are and were at the time they brought their suit on the 5th March 1913, in the Court of the Subordinate Judge of Madura, admittedly out of possession. The present action is for declaration of title and for ejectment and possession, principally directed against the Matathipathe as the head of the Mutt and the 1st and 2nd defendants lessees holding possessions under him. The other defendants have been joined as parties apparently in consequence of certain rights they possess or exercise under those defendants.

The plaintiffs base their title on two grounds: firstly, that the permanent lease under which they claim was created under circumstances that would bind not only the grantor but all his successors; and secondly, that even if the lease was not valid they had acquired a title under the Statute of Limitation by adverse possession for over twelve years from the date of the grant.

Their case throughout has been that Srinivasa was a "trustee" and that all his successors are "trustees", that the lands were granted on a "specific" trust, and that consequently under Art. 134 of the 2nd schedule of the Indian Limitation Act (IX of 1908) they have acquired a good title against the Mutt.

The Matathipathe controverted both allegations. He denied that the alienation by Srinivasa was of such a character as would bind the Mutt; he further denied that he and his predecessors were "trustees" of the Mutt or that the 2nd plaintiff or his assignee had acquired any right to the Mutt lands by adverse possession. On these contentions, two points arose for determination which are embodied in the first two issues. The Trial Judge after giving the substance of the 2nd plaintiff's evidence and of other witness, and of the other witnesses formulates the position which the pleader took up.

"He contends" says the learned Judge "that the plaintiff property is trust property set apart for the worship of the titular deity of the Mutt, that the head of the Mutt is a trustee merely, and that the permanent lease to 2nd plaintiff is an alienation of Mutt property and that 2nd defendant at this distance of time could possibly have no right to such property. The alienation being *ab initio* void, the

26th defendant had no right to plaint property as he succeeded only in 1906 and 1st plaintiff had perfected his title by adverse possession for over twelve years."

The Subordinate Judge negatived this contention; he held upon the admissions of the 2nd plaintiff that the property in suit was "ordinary Mutt property" and was not set apart on any specific trust; that the head of the Mutt was not a "bare-trustee", as it was admitted that the income was at his absolute disposal and that "none had a right to question him about it."

He found also that the 2nd plaintiff took the lease with full knowledge of the character of the endowment and had learnt on enquiry that "he could not safely purchase it."

With regard to the question of estoppel arising from the alleged acceptance of rent by the 26th defendant as the plaintiffs contended, the Subordinate Judge held:—

"In fact the 1st plaintiff never paid money as rent and the 26th defendant or his agent never accepted payment with knowledge that the payment was as rent for plaint property. In these circumstances, I find that these defendants are not estopped from denying plaintiff's title. I find this issue against plaintiffs."

He accordingly dismissed the suit save and except in respect of a money claim against the 1st and 2nd defendants.

The plaintiffs appealed to the High Court of Madras, which reversed the Trial Judge's order and decreed the claim. The learned Judges do not negative the finding of the first Court that the 2nd plaintiff took the lease with notice. But they considered that the matter in dispute fell within Art. 134 referred to above. They summed up their conclusion in the following words: "that the lessor intended to grant, and the lessee intended to acquire, an interest greater than the transferor was competent to alienate, and all the requirements of Art. 134 have been complied with."

The findings of the learned judges on the issue relating to limitation and the acquisition of right by adverse possession require notice. They deal first with the question of justifiable necessity, which they decide against the plaintiffs. They say: "there is no doubt that the head of a Mutt cannot in the absence of necessity bind his successors in office by a permanent lease at a fixed rent for all time." And then add: "There is no allegation, much less proof, of any such necessity. The first contention must be rejected."

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They then proceed to discuss the *nature of the endowment* in question and the position of its head. Their finding on this point is important ; they say as follows :—

"In connection with the second point a question arises as to the nature of the endowment and the position of the head of the Mutt in relation to it. The exact terms of the original grant are not in evidence. It was conceded in argument that the grant was made by one of the Naicken dynasty of Madura. The case for the appellants is that the endowment was for a specific purpose, i. e., for the worship of Gopalkrishnaswami, who is described by defendants' 1st witness as the 'titular deity of the Mutt'. The evidence does not support this contention and it has been found against in the Lower Court. A statement made by a local agent of the Mutt during the Inam Commission inquiries is relied upon for the appellants. It was apparently unsupported by any documentary evidence'. The description of the Inam as given at the close of the inquiry is that it was granted, for the support of Vyasaraaya Matam' (Ex. L). Compare also description in Ex. F. The evidence for the defendants is that the income from this property is not appropriated to any particular purpose but forms part of the general funds of the Mutt—I think the grant must be held to have been made for the general purposes of the Mutt."

They thus concur with the first court that there was no "*specific trust*" which was the foundation of the plaintiff's case. But after examining some of the judgments of their own court, they apparently felt constrained to hold that the decision of this Board in *Ram Parkash Das v. Anand Das* ¹ had crystallised the law on the subject, and definitely declared the Mohant to be a "trustee." It is to be observed that in that case the decision related to the office of Mohant, but in the course of their judgment their Lordships conceived it desirable to indicate *inter alia* what upon the evidence of the usages and customs applicable to the institution with which they were dealing, and similar institutions, were the duties and obligations attached to the office of superior; and they used the term "trustee" in a general sense, as in previous decisions of the Board, by way of a compendious expression to convey a general conception of those obligations. They did not attempt to define the term or to hold that the word in its specific sense is applicable to the laws and usages of the country. As pointed out by their predecessors in *Greedhari Doss v. Nundkissore Doss* ² the only law as to these Mohants and their functions and duties is to be found in custom and practice, which is to be proved by testimony." Generally speaking, however, the duties and obligations resting on the superior indicated in *Ram Parkash v. Anand Das* ¹ do not seem to vary. In this particular institution

1. (1916) I. L. R. 43 : 1. A. 73 : 81 M. L. J. 1

2. 11 Moo. I. A. 405 at p. 428

the position of the Matathepathe in relation to the Mutt was clearly established by testimony and concurrently found by both Courts. But the learned Judges misapprehended their Lordships' judgment and proceeded to hold that as Srinivasa who granted the permanent lease was a "trustee," his act fell under Art. 134. To this Article their Lordships will presently refer. Before doing so, however, they consider it necessary to observe that there are two systems of law in force in India, both self-contained and both wholly independent of each other, and wholly independent of foreign and outside legal conceptions. In each there are well-recognised rules relating to their religious and charitable institutions. From the year 1774 the Legislature, British and Indian, has affirmed time after time the absolute enjoyment of their laws and customs so far as they are not in conflict with the statutory laws, by Hindus and Mahommedans. It would, in their Lordships' opinion, be a serious inroad into their rights if the rules of the Hindu and Mahommedan laws were to be construed with the light of legal conceptions borrowed from abroad, unless perhaps where they are absolutely, so to speak, *in pari materia*. The vice of this method of construction by analogy is well illustrated in the case of *Vidyapurna Swami v. Vidyaniidhi Swami* ¹, where a Mohant's position was attempted to be explained by comparing it with that of a bishop and of a beneficed clergyman in England under the Ecclesiastical law. It was criticised, and rightly, in their Lordships' opinion, in the subsequent case, which arose also in the Madras High Court, of *Kailasam Pillai v. Nataraja Thambiran* ². To this judgment their Lordships will have to refer further later on.

It is also to be remembered that a "trust" in the sense in which the expression is used in English law, is unknown in the Hindu system, pure and simple.* Hindu piety found expression in gifts to idols and images consecrated and installed in temples, to religious institutions of every kind, and for all purposes considered meritorious in the Hindu social and religious system to Brahmins, *Goswamis*, *sanyasis*, etc. When the gift was to a holy person, it carried with it in terms or by usage and custom certain obligations. Under the Hindu law the image of a deity of the Hindu pantheon is, as has been aptly called a "juristic

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1. (1904) I. L. R. 27 Mad. 435 : 14 M. L. J. 105.

2. (1909) I. L. R. 33 Mad. 266 : 19 M. L. J. 778.

* J. C. Ghose, "Hindu Law" p. 276.

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entity," vested with the capacity of receiving gifts and holding property. Religious institutions, known under different names, are regarded as possessing the same "juristic" capacity, and gifts are made to them *co-nomine*. In many cases in Southern India, especially where the diffusion of Aryan Brahmanism was essential for bringing the Dravidian peoples under the religious rule of the Hindu system, colleges and monasteries under the names of Mutt were founded under spiritual teachers of recognised sanctity. These men had and have ample discretion in the application of the funds of the institution but always subject to certain obligations and duties equally governed by custom and usage. When the gift is directly to an idol or a temple, the seisin to complete the gift is necessarily effected by human agency. Called by whatever name, he is only the manager and custodian of the idol or the institution. In almost every case he is given the right to a part of the usufruct, the mode of enjoyment and the amount of the usufruct depending again on usage and custom. In no case was the property conveyed to or vested in him, nor is he a "trustee" in the English sense of the term, although in view of the obligations and duties resting on him, he is answerable as a trustee in the general sense for mal-administration.

The conception of a trust apart from a gift was introduced in India with the establishment of Moslem rule. And it is for this reason that in many documents of later times in parts of the country where Mahommedan influence had been predominant, such as Upper India and the Carnatic, the expression *wakf* is used to express dedication.

But the Mahommedan law relating to trusts differs fundamentally from the English law. It owes its origin to a rule laid down by the Prophet of Islam; and means "the tying up of property in the ownership of God the Almighty and the devotion of the profits for the benefit of human beings." When once it is declared that a particular property is *wakf*, or any such expression is used as implies *wakf*, or the tenor of the document shows, as in the case of *Jewun Doss Salu v. Shah Kubeeruddin* ¹ that a dedication to pious or charitable purposes is meant, the right of the *wakif* is extinguished and the ownership is transferred to the Almighty. The donor may name any meritorious object as the recipient of the benefit. The

1. (1840) 2 M. I. A. 390.

manager of the wakf is the Mutawalli, the governor, superintendent, or curator. In *Jewin Doss Sahu's case*, the Judicial Committee call him "procurator." It related to a Khankhas, a Mahommedan institution analogous in many respects to a Mutt where Hindu religious instruction is dispensed. The head of these Khankhas, which exist in large numbers in India, is called a Sajjada-nashin. He is the teacher of religious doctrines and rules of life and the manager of the institution and the administrator of its charities, and had in most cases a larger interest in the usufruct than an ordinary Mutwalli. But neither the Sajjada-nashin nor the Mutwalli has any right in the property belonging to the wakf; the property is not vested in him and he is not a "trustee" in the technical sense.

It was in view of this fundamental difference between the juridical conceptions on which the English law relating to trusts is based, and those which form the foundations of the Hindu and the Mahomedan systems that the Indian Legislature in enacting the Indian Trusts Act (II of 1882) deliberately exempted from its scope, the rules of law applicable to wakf and Hindu religious endowments. Sec. I of that Act, after declaring when it was to come into force and the areas over which it should extend "in the first instance", lays down, "but nothing herein contained affects the rules of Mahomedan law as to wakf, or the mutual relations of the members of an undivided family as determined by any customary or personal law, or applies to public or private religious or charitable endowments ..." Sec. 3 of the Act gives a definition of the Act of the word "trust" in terms familiar to English lawyers. It says :—

"A 'trust' is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared and accepted by him, for the benefit of another, or of another and the owner; the person who reposes or declares the confidence is called the 'author of the trust'; the person who accepts the confidence is called the 'trustee'; the person for whose benefit the confidence is accepted is called the 'beneficiary'; the subject-matter of the trust is called 'trust-property' or 'trust-money'; the 'beneficial interest' or 'interest' of the beneficiary is his right against the trustee as owner of the trust-property; and the instrument, if any, by which the trust is declared is called the 'instrument of trust'."

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In this connection it may be observed that in the case of *Muhammad Rustam Ali v. Mushtag Husain*¹, the dedication was of specific property created by an instrument called a "trustee-namah." Lord Buckmaster, delivering the judgment of the Board, dealt thus with the objection as to the validity of the document:—

"It is argued," said the noble Lord, "that the trustee-namah must have dealt with an interest in immovable property, for otherwise the trustees could have no right to maintain the suit and such an argument at first sight makes a strong appeal to those who are accustomed to administer the English law with regard to trustees. It needs, however, but a slight examination to show that the argument depends for its validity upon the assumption that the trustees of the wakf-nama in the present case stand in the same relation to the trust that trustees to whom property had been validly assigned would stand over here: Such is not the case. The wakf-nama itself does not purport to assign property to trustees.

In 1810 in the Bengal Presidency, and in 1817 in the Madras Presidency, the British Government had assumed control of all the public endowments and benefactions, Hindu and Mahomedan, and placed them under the charge of the respective Boards of Revenue. In 1863, under certain influences to which it is unnecessary to refer, the Government considered it expedient to divest itself of the charge and control of these institutions, and to place them under the management of their own respective creeds. With this object, Act XX of 1863 was enacted; a system of Committees was devised to whom were transferred the powers vested in Government for the appointment of "managers, trustees and superintendents"; rules were enacted to ensure proper management and to empower the superior court in the District to take cognisance of allegations of misfeasance against the managing authority. There Lordships are not giving a summary of the Act, but indicating only its general features. The Act contains no definition of the word "trustee"; it uses indifferently and indiscriminately the terms "manager; trustee or superintendent," clearly showing that the expressions were used to connote one and the same idea of management. After the enactment of 1863,

1. (1920) L. R. 47 Ind. App. 224. 42 All. 609 : 39 M. L. J. 263.

the Committees, to whom the endowments were transferred, were vested, generally speaking, with the same powers as the Government had possessed before in respect of the appointment of "managers, trustees or superintendents,"

Article 134 of the 2nd Schedule to the Indian Limitation Act (IX of 1908) is in these terms. "To recover possession of immovable property conveyed or bequeathed in trust or mortgaged and afterwards transferred by the trustee or mortgagee for valuable consideration," the period prescribed for the institution of the suit is twelve years "from the date of transfer." In the old Act XV of 1877 the words were "purchased from the trustee or mortgagee." The alteration was made with the object of including permanent leases in transactions of the character contemplated in the Article.

Article 134 is, as pointed out in *Abluram Goswami's case* ¹ controlled by Section 10 of the Limitation Act, which runs thus.

"Notwithstanding anything herein before contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property or proceeds thereof or for an account of such property or proceeds shall be barred by any length of time."

The language of Section 10 gives the clue to the meaning and applicability of Art. 134. It clearly shows that the Article refers to cases of specific trust, and relates to property "conveyed in trust." Neither under the Hindu Law nor in the Mahommedan system is any property "conveyed" to a shebait or a mutwalli, in the case of a dedication. Nor is any property vested in him; whatever property he holds for the idol or the institution he holds as manager with certain beneficial interests regulated by custom and usage. Under the Mahommedan Law, the moment a wakf is created all rights of property pass out of the wakif, and vest in God Almighty. The curator, whether called Mutwalli or Sajjadanashin, or by any other name, is merely a manager. He is certainly not a "trustee", as understood in the English system.

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In *Sammantha Pandara v. Sellapa Chetti*,¹ the position of the superior in relation to the properties of the Mutt was laid down in terms which have an important bearing on the present case. The learned Judges say there —

“The property is in fact attached to the office and passes by inheritance to no one who does not fill the office. It is in a certain sense trust property; it is devoted to the maintenance of the establishment but the superior has large dominion over it, and is not accountable for its management nor for the expenditure of the income, provided he does not apply to any purpose other than what may fairly be regarded as in furtherance of the objects of the institution. Acting for the whole institution he may contract debts for purposes connected with his mattam, and debts so contracted might be recovered from the mattam property and would devolve as a liability on his successor to the extent of the assets received by him.”

The origin and nature of these Mutts were again considered at great length in a case which arose in the same Court in 1886. In this case *Gyana Samandha v. Kandasami*² the learned Judges pronounced that the head of the institution held the mattam under his charge, and its endowment in trust for the maintenance of the Mutt, for his own support, for that of his disciples, and for the performance of religious and other charities in connection therewith according to usage. An almost identical question came up for consideration in 1904 in *Vidyapurna Tirtha v. Vidyavidhi Tirtha*³ already referred to. In this case the learned Judges, after an elaborate examination of English institutions which they conceived to be analogous to Hindoo Mutts, came to the conclusion that whilst a Dharma-karta of a temple who has specific duties to perform might be regarded as a trustee, the superior of a Mutt is not a trustee but a “life tenant.”

The same question in another form came up again for consideration in 1909 before a Divisional Bench of the Madras High Court in the case of *Kailasam Pillai v. Nataraja Thambiram*⁴. The learned Judges before whom the point arose considered that the view taken in *Vidyapurna v. Vidyavidhi*³ was in conflict with that propounded in the two earlier cases

1. (1879) I. L. R. 2 Mad. p. 175.

2. (1886) I. L. R. 10 Mad. 375.

3. (1904), I. L. R. 27 Mad. 435; 14 M. L. J. 105.

4. (1909) I. L. R. 33 Mad. 265.

and referred the question to a Full Bench. The reference was in these terms: "Does the head of a Mutt hold the properties constituting its endowment as a life-tenant or as a trustee?"

The Officiating Chief Justice expressed his opinion in the following terms:—

"I think, then, that it cannot be predicated of the head of a Mutt, as such, that he holds the properties constituting its endowments as a life-tenant or as a trustee. The incidents attaching to the properties depend in each case upon the conditions on which they were given, or which may be inferred from the long continued and well-established usage and custom of the institution in respect thereto."

Mr. Justice Wallis substantially agreed in this view.

Mr. Justice Sankaran Nair pointed out that in the case of these Mutts:—

"Any surplus that remains in the hands of the Pandara Sannadhi, he is expected to utilise for the spiritual advancement of himself, his disciples or of the people. But his discretion in this matter is unfettered. He is not accountable to anyone and he is not bound to utilise the surplus. He may leave it to accumulate."

And he further added, "It is also true in my opinion that he is under a legal obligation to maintain the Mutt, to support the disciples and to perform certain ceremonies which are indispensable. That will be only a charge on the income in his hands and does not show that the surplus is not at his disposal." In the result, he was opinion "that in the absence of any evidence to the contrary, the Pandara Sannadhi (the superior) as such is not a trustee. He is not also a life-tenant for the reasons already stated." All three Judges agreed in thinking that if any specific property was specifically entrusted to the head for specific purposes he might be regarded a "trustee" with regard to that property; but that in the absence of any such evidence the superior was not a trustee in respect of any part of the endowment.

The point came up for discussion again in a concrete form in 1913 in *Muthusamiar v. Sreemethanithi*¹, where the exact point for decision was the question of limitation. The facts which gave rise to the litigation were almost identical with the

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¹, (1913) I, L. R. 38 Mad. 356 : 25 M. L. J. 393.

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the present case before their Lorships, with this difference, that the suit there was brought by the head of the Mutt to recover possession of the leased properties.

Mr. Justice Miller states thus the question for determination :—

“ The principal question, a question which arises in both the appeals, is whether the suit is barred by limitation. It is conceded for the appellants that the lease is in excess of the powers of the Matathipathe, and their contention is that the suit is barred because limitation must run from the date of the alienation in 1872, the lease being void, or at the latest from the death of Sukgnana Nidhi Swamiar in 1890.”

The learned Judges held in substance that there was no specific trust, that the properties were given or endowed generally for the performance of the worship of the deities in the Mutt and other attendant duties and for the support of the superior and his disciples ; that a lease granted by him was valid for his life, and if adopted by his successor would enure during his term of office ; but neither the original alienation nor the subsequent adoption would create a bar by adverse possession.

These cases deal exclusively with the position of the superior of a Mutt in relation to its endowment. But there are some others respecting the powers of the managers of religious institutions generally. In *Mahomed v. Ganapati* ¹ a lease was granted by the Dharmakarta of a temple ; and the suit to recover the leased lands was brought by his successor in office. The defence was limitation running from the date of alienation. Mr. Justice Sheppard (Muthusami Aiyar, J. concurring) held as follows :—

“ In the present case, though the plaintiff may in point of time have succeeded the Dharmakarta who made the alienation, he does not derive his title from that Dharmakarta and is, therefore, not bound by his acts. Subject to the law of limitation, the successive holders of an office, enjoying for life the property attached to it, are at liberty to question the dispositions made by their predecessors. (*Papayya v. Ramana, Jamal Saheb Murgaya Swami, Modho Koory v. Tekait Ram Chunder Singh*) and it is equally clear that time runs against the successor who challenges his predecessor's disposition, not from the date of the disposition, but from the date of predecessor's death; when

1. (1890) 1. L. R. 13 Mad. 277.

only the successor became entitled to possession. Accordingly, Raman Pujari having died so recently as 1885, the plaintiff's suit cannot be barred by limitation."

This was followed in *Sathuanama Bharate v. Saravanabaga Ammal* ¹. In this case the superior is called the "manager."

In *Chockalingam Pillai v. Mayandi Chetliar* ² it was contended that "the manager for the time being had no power to make a permanent alienation of temple property in the absence of proved necessity for the alienation." But from the long lapse of time between the alienation and the challenge of its validity, coupled with other circumstances, the learned Judges came to the conclusion that necessity may reasonably be presumed.

From the above review of the general law relating to Hindu and Mahomedan pious institutions it would *prima facie* follow that an alienation by a manager or superior by whatever name called cannot be treated as the act of a "trustee" to whom property has been "conveyed in trust" and who by virtue thereof has the capacity vested in him which is possessed by a "trustee" in the English law. Of course a Hindu or a Mahomedan may "convey in trust" a specific property to a particular individual for a specific and definite purpose, and place himself expressly under the English law when the person to whom the legal ownership is transferred would become a trustee in the specific sense of the term.

But the respondents rely on three decisions of the Indian Courts in support of their contention that persons holding properties generally for Hindu and Mahomedan religious purposes are to be treated as "trustees." The first is a decision of the Bombay High Court in *Dattagiri v. Dattatraya* ³. The facts of that case were peculiar. The Mutt there was an old one and the dedication was recognised and confirmed by the Mahratta Government. The village was granted to a holy ascetic for the maintenance of a charity attached to the Mutt; the governance went by succession to the disciples of the guru (the spiritual preceptor or head). In 1871 the village was divided between disciples, Shivgiri and Shankargiri, in equal moieties, and each held his half separately from the other. In the same year one of them Shankargiri, sold the lands in dispute to the defendant. In

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1. I. L. R. 18 Mad. 260.

2. I. L. R. 19 Mad. 485.

3. I. L. R. 27 Bom. 363.

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1897 Shankargiri obtained a Sanad from government under Act II of 1863 declaring him to the absolute owner of his share. He died in August, 1897, after appointing the plaintiff as his successor, who in 1898 brought an action to recover possession of the alienated lands on the ground that Shankargiri had no power to alienate them as they were dedicated property. The defence was firstly that the Sanad had altered the character of the property, and secondly that the suit was barred. The Lower Appellate Court found that the lands in suit were private alienable property and that consequently the action was barred. The first finding was strongly challenged by the plaintiff's counsel on second appeal. He contended that as it was dedicated property its holders from time to time "could not allow the Government to treat it as private property. The learned Judges of the High Court refrained from deciding that point and confined their attention solely to the question of limitation. They proceeded to deal with the case, as they expressly say, "on the hypothesis that the lands in suit were held by Shivgiri and Shankargiri as heads of the Mutt and as trustees therefor." On that hypothesis the conclusion at which they arrived was inevitable. The position of the head of the Mutt in relation to its property under the Hindu Law, custom and practice, was not considered; he was simply assumed to be a trustee. The pith of the judgment consists in the following words:—"We have then here a suit to recover possession of immoveable property conveyed in trust and afterwards purchased from the trustee for a valuable consideration." "Conveyed in trust" is hardly the right expression to apply to gifts of land or other property for the general purposes of a Hindu religious or pious institution. The learned judges relied on the two decisions of the Allahabad and Calcutta High Courts to which their Lordships will presently refer. The case, however, was practically decided on the exposition of the law in the case of *St. Mary Magdalen Oxford, v. The Attorney General*¹. With respect to it they say as follows:—

"In further support of this conclusion we would also refer to the already cited case of *St. Mary Magdalen. Oxford, v. The Attorney General*, for though it is a decision on the English statute, still it contains many points of resemblance to the present, and furnishes us with the clearest exposition of the law

¹. 6 H. L. C. 189.

applicable to cases of this class. We propose to refer to that case in some detail, as it probably is not within the reach of most mofussil Courts in this Presidency."

They set out the provisions of Sections 2, 24 and 25 of Will. IV c. 27, and then add "the Section (S. 25), it will be seen, corresponds more or less with our Articles 134 and 144 and Section 10 of the Limitation Act."

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Speking with respect, it seem to their Lordships that the distinction between a specific trust and a trust for general, pious or religious purposes under the Hindu and Mahommedan law was overlooked, and the case was decided on analogies drawn from English law inapplicable in the main to Hindu and Mahommedan institutions. That case can hardly be treated as authority in the decision of the present controversy.

The case of *Narayan v. Shri Ramchandra* only followed the view expressed in *Dattagiri v. Duttatraya* ². But the facts, when examined, show a marked difference in the legal position of the parties in the two cases. The mulgeni lease under which the defendant claimed title was granted in 1845, and the suit to set it aside was brought somewhere in 1899. Repeated attempts were made by successive managers of the temple to obtain enhancement of rent, but the suits were invariably withdrawn. There was thus clear acquiescence on the part of successive managers in the validity of the transaction. The case fell within the principle of *Chocalingam Pillai* ³, and might well have been decided without disturbance of Hindu Law or usage.

The second decision relied upon in support of the respondent's contention is the case of *Behari Lal v. Mahammad Muttaki* ⁴, which related to a Mahommedan "shrine. The origin and history of these "shrines" or durgahs, as they are called, is described compendiously in the judgment in *Puran Bibi v. Abdul Karim* ⁵.

"The Sajjadanashin has certain spiritual functions to perform. He is not only a mutwalli, but also a spiritual preceptor. He is the curator of the durgah where his ancestor is buried, and in him is supposed to continue the spiritual line (silsilla). As is well known, these durgahs are the tombs of celebrated

1. (1903) I. L. R. 27 Bom. 373.

2. (1903) I. L. R. 27 Bom. 363.

3. (1896) I. L. R. 19 Mad. 485.

4. I. L. R. 20 All. 482

5. (1893) I. L. R. 19 Cal. 203.

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dervishes, who in their life-time were regarded as saints. Some of these men had established khankahs where they lived and their disciples congregated. Many of them never rose to the importance of a khankah, and when they died their mausolea become shrines or durgahs. These dervishes professed esoteric doctrines and distinct systems of initiation The preceptor is called the *pir*, the disciple the *murid*. On the death of the *pir* his successor assumes the privilege of initiating the disciples into the mysteries of dervishism or sufism. This privilege of initiation, of making *murids*, of imparting to them spiritual knowledge, is one of the functions which the Sajjadanashin performs or is supposed to perform. The endowment is maintained by grants of land to the shrines by pious Moslems. The head of the institution, like that of a khankah, is called a Sajjadanashin. The governance (towlat) of the endowment is in his hands ; he is a mutwali, with the duty of imparting spiritual instruction to those who seek it. The property of the 'shrine' is wakf 'tied up in the ownership of God.'

The appointment of the Sajjadanashin is regulated by usage and practice. This is referred to in the same judgment :—

"Upon the death of the last incumbent, generally on the day of what is called the sium or teja ceremony (performed on the third day after his decease", the fakirs and murids of the durgah, assisted by the heads of neighbouring durgahs, instal a competent person on the guddi; generally the person chosen is the son of the deceased or somebody nominated by him, for his nomination is supposed to carry the guarantee that the nominee knows the precepts which he is to communicate to the disciples. In some instances the nomination takes the shape of a formal installation by the electoral body, so to speak, during the life-time of the incumbent."

The duties in connection with the "shrine", apart from giving spiritual instruction, consist in the due observance of the annual ceremonies at the tomb of the Saint, the distribution of charity at fasts and festivals, the celebration of the birthday of the Prophet, and the performance of other rites and ceremonials prescribed either by the religious law or by usage and practice. Ordinarily speaking, the Sajjadanashin has a larger right in the surplus income than a mutwali, for so long as he does not spend it in wicked living or in objects wholly alien to his office,

he, like the Mohant of a Hindu Mutt, has full power of disposition over it.

In *Behari Lal v. Mahummad Muttaki* ¹ the plaintiff as Sajjadanashin sued to set aside certain mortgages executed by his predecessor in office; and dated his cause of action from the time he was appointed as Sajjadanashin. The learned Judges on a misconception of the rules of the Mahommedan law and of the judgment of their Lordships in *Jewan Doss Sahoo v. Shah Kubeeruddin* ² held that the sajjadanashin was a "trustee." One Judge held that the suit was barred either under Art. 134 or Article 144; the two others held that Art. 134 was applicable as the mortgages were created by a "trustee."

Their Lordships have to differ from this conclusion. In their opinion this case was not, in view of the considerations set forth above, correctly decided.

As regards the third case, *Nulmony Singh v. Jagabandhu Roy* ³ the suit was brought by the plaintiff as the shebait of a Hindu idol to set aside a durmokurrari pottah, executed in respect of certain of the debuttar lands by two ladies who acted as shebait during his minority. He alleged that he became entitled to sue for possession of the alienated lands on his appointment to the office of shebait by a decree of the Court. The material defence was that the claim was barred. It should be observed that the durmokurrari was created in 1857 and the suit was brought after 1888. In the judgment of the High Court the words shebait and trustee are used as synonymous and convertible terms; the expression is always "shebait or trustee. Probably the fact that the shebait had duties and obligations in connection with the dedication, influenced the employment of the word "trustee" in a general sense. Mr. Mayne uses the expression in the same general sense to connote the same idea. That the learned Judge did not regard the shebait as a trustee in the specific sense may be inferred from his indecisive conclusion as to the application of Art. 134 to the plaintiff's claim. It is quite clear, however, that the legal position of a shebait is quite different from that of a trustee to whom the specific property is "conveyed" on a specific trust. In *Prusunno Kumari Debya v. Golab Chand Baboo* ⁴ where the question for determination was whether a

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1. I. L. R. 20 All. 482.

2. (1841) 2 M. I. A. 390.

3. I. L. R. 23 Cal. 536

4. I. L. R. 2 Ind. App. 145.

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particular transaction challenged as invalid had been entered into for such necessity as would make it binding on the dedication, Sir Montague E. Smith, in delivering the judgment of the Board, scrupulously avoided the use of the confusing word "trustee". Dealing with the powers of the shebait, he said as follows :—

"But notwithstanding that property devoted to religious purposes is, as a rule, inalienable, it is in their Lordships' opinion, competent for the shebait of property dedicated to the worship of an idol, in the capacity as shebait and manager of the estate, to incur debts and borrow money for the proper expenses of keeping up the religious worship, repairing the temples or other possessions, of the idol, defending hostile litigious attacks and other like objects. The power, however, to incur such debts must be measured by the existing necessity for incurring them. The authority of the shebait of an idol's estate would appear to be in this respect analogous to that of the manager for an infant heir as defined in a judgment of this Committee delivered by Knight Bruce L. J.

"It is only in an ideal sense that property can be said to belong to an idol, the possession and management of it must, in the nature of things, be entrusted to some person as shebait or manager. It would seem to follow that the person so entrusted must of necessity be empowered to do whatever may be required for the service of the idol and for the benefit and preservation of its property at least to as great a degree as the manager of an infant heir. If this were not so the estate of the idol might be destroyed or wasted and its worship discontinued for want of the necessary funds to preserve and maintain them."

The identical question relating to the powers and position of a shebait was again before the Board in the case of *Abhiram Goswami*¹, already referred to. With regard to the powers of the shebait, their Lordships say as follows:—

"The second question is whether, this being so, the Mohant had power to grant a Mokarrari Pottah of the Mouzah. It is well settled law that the power of the Mohant to alienate debottar property, is like the power of the manager for an infant heir, limited to cases of unavoidable necessity : *Prosunna Kumari*

1. (1909) L. R. 36 I A ; 148 : 19 M. L. J. 522.

Debya v. Golab Chand ¹. In the case of *Konwur Doorganath Roy v. Ram Chander Sen* ², a Mokarrari Pottah of debuttar lands was supported on the ground that it was granted in consideration of money said to be required for the repair and completion of a temple, for which no other funds could be obtained. But the general rule is that laid down in the case of *Maharane Shubessouree Debia v. Mothoranthi Acharjo* ³, that apart from such necessity to create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time, would be a breach of duty in the Mohant. There is no allegation that there were any special circumstances of necessity in this case to justify the grant of the Pottah of 1860, which, on the most favourable construction enured only for the lifetime of the grantor. Pranananda, who died in 1891, or of the Pottah of 1896, which, at best, could only be deemed operative during the lifetime of Rahubananda, who died in 1900.

The question came up again for consideration by the Board in the case of *Palaniappa Chetty v. Dervasikamony Pandara* ². The suit was instituted by the head of a Mutt to recover possession of certain land which formed part of the endowment of a Hindu temple attached to the Mutt, and had been granted by his predecessor to the defendant by a perpetual rent-free lease in consideration of a small sum of money paid at the time. The contention in that case was that the alienation was for the benefit of the institution; that contention was overruled, and the decision proceeded on the basis that the shebait was only a manager. Lord Atkinson, delivering the judgment of the Board, further added:—

“Three authorities have been cited which establish that it is a breach of duty on the part of a shebait, unless constrained thereto by unavoidable necessity, to grant a lease in perpetuity of debottar lands at a fixed rent, however adequate that rent may be at the time of granting, by reason of the fact that by his means the debottar estate is deprived of the chance it would have, if the rent were variable, of deriving benefit from the enhancement in value in the future of the lands leased,”

In that case the leased lands were situated in the street of a village; here they are in the town of Madura.

P. C.

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Varuthi
Thirtha
Swamigal

v.
Balusami
Ayyar
and others.

Mr. Ameer
Ali.

1. L. R. 2 I. A. 145.

2. L. R. 4 I. A. 52.

3. 13 M. I. A. 270.

4. (1917) L. R. 44 I. A. 147; 33 M. B. J. 1: 40 M. 709.

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 ———
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 ———
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Reverting then to the judgment in *Nilmoney Singh*,¹ their Lordships think that the expression "trustee" was loosely and speaking with respect, wrongly applied to the shebait in order to bring the case under Article 134. It is to be observed that in none of the three cases was there any examination of the laws and usages governing the respective institutions, or of the Madras decisions, in which the subject had been elaborately considered.

In the present case the character of the endowment in relation to the superior is proved beyond contradiction. It has been found concurrently by both the Courts in India that the endowment was held by the defendant No. 26 for the general purposes of the institution. Considerable stress was laid on behalf of the respondents on the entry in the Inam Register that the dedication was for a specific purpose, viz., the worship of the idol. The Inam proceedings did not create any dedication. They were instituted simply with the object of investigating titles to hold lands revenue-free as belonging to valid endowments. The gifts were made long before the Inam proceedings by the Hindu kings or chiefs who then held the country. The purposes of the dedication must therefore be gathered from established usage and practice, and that has been found by the Courts in India. Again, "valuable consideration" forms the essence of both S. 10 of the Limitation Act and of Art. 134 of the 2nd Schedule. Even if this were a specific trust, which it is not, it would be ridiculous to hold that the rent reserved in the grant to the second plaintiff was "valuable consideration."

In the Courts below the plaintiffs rested their claim mainly, if not entirely, on Art. 134. Before the Board an alternative argument has been advanced. It is contended that the second plaintiff acquired the title he is seeking to establish by twelve years adverse possession under Art. 144. That article declares that for a suit "for possession of immovable property or any interest therein not hereby (i.e., by the schedule) otherwise especially provided for" the period of limitation is twelve years from the date when the possession of the defendant became adverse to the plaintiff. In view of the argument it is necessary to discover when, according to the plaintiff, his adverse possession began. He was let into possession by

Mohunt No. 1 under a lease which purported to be a permanent lease, but which under the law could endure only for the grantor's lifetime. According to the well settled law of India (apart from the question of necessity which does not here arise) a Mohunt is incompetent to create any interest in respect of the Mutt property to endure beyond his life. With regard to Mohunt No. 2, he was vested with a power similarly limited. He permitted the plaintiff to continue in possession and received the rent during his life. Such receipt was with the knowledge which must be imputed to him that the tenancy created by his predecessor ended with his predecessors' life, and can, therefore, only be properly referable to a new tenancy during his life, and in these circumstances the proper inference is that it was so continued, and consequently the possession never became adverse until his death.

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There is one other point which deserves notice. The administration of the second Mohunt lasted until 1906. In 1905, however, the Mutt went under the management of the Dewan of the Mysore State, under power of attorney granted by the Mohunt and his successor, who may conveniently be designated as Mohunt No. 3. Certain persons to whom the second plaintiff had sub-leased the lands for ten years thereupon obtained from the Dewan during the currency of their term a lease for seventeen years. It is a direct lease from the Dewan as holder of a power of attorney from Mohunt No. 3. The lessees thereunder have been in possession for some years prior to this suit, and the object of the present action is not to keep the plaintiff in possession, but to eject these possessors who hold under a title proceeding from the Dewan and Mohunt No. 3, and to upset the act of administration of Mohunt No. 3, on the ground of rights acquired adversely to the Mutt by lapse of time during the incumbency of Mohunt No. 2.

For the foregoing reasons their Lordships are of opinion that neither Article 134 nor Article 144 applies to this case, that the plaintiffs have acquired no title by adverse possession under either of those Articles; that the Judgment and decree of the High Court, Madras, must therefore be reversed, and the order of the Subordinate Judge dismissing the suit restored with costs here and of the Appellate Court.

Their Lordships will humbly advise His Majesty accordingly. *Appeal allowed.*

Solicitors appellant—*T. L. Wilson & Co.*

Solicitor for respondents.—*H. S. L. Polak.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE RAMESAM.

Subraya Bhandary and others ... *Appellant.* (Plaintiff.)*

v.

Janardhana Bhandary and another ... *Respondents (Defendants 1 & 3).*

Subraya
Bhandary

v.
Janardhana
Bhandary

Civil Procedure Code, O. 8, R. 6—Set-Off—Barred debt—Suit for Partition among members of joint Hindu Family

In a suit for partition among the members of a joint Hindu Family it is not open to the defendant, a member of the family, to claim a set off in respect of a debt due to him from the joint family but the recovery of which had become barred by limitation at the date of the suit. *Vellaya Moothan v. Krishna Moothan (i).* Relied on.

Second appeal against the decree of the District Court of South Kanara in A. S. No. 515 of 1919 preferred against the decree of the Court of the District Munsif of Mangalore in O. S. No. 292 of 1918.

C. V. Ananthakrishna Iyer for appellants.

B. Sitarama Rao for Respondents.

The Court delivered the following

Judgment :—In this case the defendant's grandfather took an assignment of a mortgage from a creditor of the family to which the plaintiffs' and defendants' ancestors belonged. He simultaneously took a sale-deed of the one-third interest of one of his two brothers in the family house for Rs. 188 of which Rs. 123-8-0 represented that brother's share of the debt and thus became the full owner of that brother's share as well as his own share over which the mortgage became extinguished by merger.

He did not take any proceedings to recover the amount secured by the mortgage or a proportionate part thereof from the plaintiffs' grandfather's share and his right to do so was at the date of this suit barred by limitation.

In a suit by plaintiff for partition the defendant claims to set off the amount by which the plaintiff's estate has been bene-

* S. A. No. 1432 of 1920.

3rd. February 1921.

1. (1917) 84 M. L. J. 32.

fited through the defendants' grandfather's omission to bring it to sale in pursuance of his rights as assignee mortgagee.

The Lower Courts have called upon the plaintiff to pay Rs. 123-8-0 as an equitable set-off before being put in possession of his share of the family property.

Subrava
Bhandary
v
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Bhandary

We do not think the defendants are entitled to this set off. At the date of partition there was no outstanding equity in the defendants' favour. They allowed their separate claim against the family property to become time barred with the result that at the date of suit there was no outstanding debt which they were legally entitled to recover.

This case resembles that of *Vellayappa Moothan v. Krishna Moothan*¹ in which it was held that a debt of a joint family to a partnership in which some of the members of a joint family were partners could not be treated as an item of account in the partition suit, when the debt had become barred. Several cases have been cited in which equitable set-offs have been allowed when taking accounts at the time of partition even though those claims were barred by limitation, but they are all cases in which the claims arose out of the same transaction or were so closely connected together that in taking accounts it became necessary to set off some debit items against other credit items. In this case there is no such connection between the separate title of the defendants' ancestor under the mortgage and the present right of the members of the family to have an equal division of the family property. The liability of a joint family to individual members is not assets or property to be brought into the hotchpot at division see the observations of Sadasiva Aiyar, J., in *Vellayappa Moothan v. Krishna Moothan*¹

The appeal must be allowed and the direction that plaintiff should pay Rs. 123-8-0 will be struck out of the decree. Plaintiffs will get one-third of their costs throughout.

The memorandum of objections is dismissed without costs.

A. V. V.

Appeal allowed.

1. (1917) 34. M. L. J 22.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE RAMESAM.

Vanchinatha Iyer ... Appellant * (1st Defendant).
v.

Rajagopala Iyer and others Respondent (Plaintiffs and
... 2nd defendant).

Vanchinatha
Iyer
v.
Rajagopala
Iyer
and others.

Madras Hereditary Village Offices Act (III of 1895) Ss. 3 (4) 13 and 14—Service inam lands—Purohit service—Suit for possession—Jurisdiction—Civil Court—Enfranchisement—Adverse possession.

Ss. 13 and 21 of Madras Act III of 1895 confer exclusive jurisdiction on Revenue courts over suits for the recovery of the emoluments of hereditary offices falling under S. 3 CL (4), one of which is the office of village purohit in proprietary estates as well as in ryotwari villages *Kandappa Achari v. Vengamma Naidu* (1) Relied On.

S. 14 of Madras Act III of 1895 prescribes a period of three years for suits under the Act but does not extinguish the rights of persons who fail to sue in time. *Pichuvayyar v. Vilakkudayan Asari*. 2 Ref.

Second Appeal against the Decree of the Court of the Temporary Subordinate Judge of Chingleput in Appeal Suit No. 77 of 1919 presented against the decree of the Court of the Additional District Munsif of Chingleput in Original Suit No. 229 of 1916.

Facts :—The suit lands were originally all of them purohit service inam lands and had been mortgaged to the first defendant by the last male owner who died leaving a widow as his next heir. The widow herself died in 1902 and in 1905 the third item of the suit lands was enfranchised in the name of the first defendant. In 1916 plaintiff as the nearest reversioner brought a suit in the Civil Court for recovery of possession of all the lands alleging that the mortgage was invalid and even otherwise, it had been discharged.

T. R. Venkatarama Sastri and *P. S. Narayanaswami Aiyar* for appellant.

C. V. Anantha Krishna Aiyar for respondent.

The Court delivered the following

Judgment :—The plaintiffs brought this suit to recover three items of property in Siruvakkam and Koneriappam Villages on the strength of their reversionary right as heirs

* Second appeal No. 402 of 1920.

18th January, 1921.

1. (1913) I. L. R. 37 Mad. 548 : 25 M. L. J. 42.

2. (1897) I. L. R. 21 Mad. 131.

to the late Samu Ayyar. This suit failed in the first court on a finding by the District Munsif on the question of plaintiff's father's adoption, but on appeal the Subordinate Judge found this point in their favour and gave them a decree for possession on payment of the amount spent by 1st defendant in redeeming the property from the hands of mortgagees.

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v
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Iyer.
and others

In Second Appeal the 1st defendant has for the first time raised the contention that the Civil Courts had no jurisdiction over the suit which was brought for the recovery of the emoluments of the office of purohit in a proprietary estate and we have allowed him to argue this point of law, seeing that if he is right in his contention, the decree obtained by the plaintiff cannot stand.

After the Full Bench decision in *Kandappa Achary v. Vengama Naidu* ¹, which supported *Mutyala Papayya v. Koneri Musaimmullu* ² and overruled *Veerabhadran Achari v. Suppiah Achari* ³ it must be regarded as settled law that S. 13 of Madras Act III of 1895 confers jurisdiction on Revenue Courts over suits for the recovery of the emoluments of hereditary offices falling under S. 3 clause (4), one of which is the office of village purohit or priest in proprietary estates as well as in ryotwari villages. At the same time S. 21 ousts the jurisdiction of Civil Courts in respect of such suits.

Of course a suit in which the plaintiff does not need to rely on his right to the office and its emoluments in order to succeed, such as would be the case in the instance cited in the words of Subramania Aiyar J. at page 210 of *Moovula Seetham Naidu v. Doodi Ram Naidu* ⁴ stands on a different footing. But this is not such a case. In the plaint in this suit the plaintiff mentions expressly the nature of the property he sues to recover viz. purohit maniam and traces his descent by a geneological tree to the previous office holders.

The plaintiff's suit must accordingly be dismissed in respect of the first two items but without costs as the point of jurisdiction was taken at a late stage. This dismissal will be without prejudice to any suit that may hereafter be filed in the proper court.

1. (1913) I. L. R. 37 Mad. 548 : 25 M. L. J. 42. 2. (1912) 22 M. L. J. 156.

3. (1909) I. L. R. 33 Mad. 488.

4. (1909) I. L. R. 33 Mad. 208 : 20 M. L. J. 91.

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Iyer
v.
Rajagopala
Iyer.
and others

The third item in suit is an enfranchised nam. Mr. Venkrama Sastri argues that the suit is barred by limitation in respect of it as S. 14 of Act III of 1895 prescribes a term of three years' limitation for suits under the Act and more than 3 years had elapsed on the date of suit since the widow died in 1902.

Act III of 1895 however has no provision corresponding to S. 28 of the Limitation Act which extinguishes the right of persons who fail to sue in time, See *Pichuvayyar v. Vilakudayan Asari* ¹ and *Secretary of State v. Vira Rayan* ².

The plaintiff had 60 years under Article 148 of the Limitation Act to sue for redemption from the date of the mortgage and 12 years to sue for possession from the date of the widow's death under Article 141.

His suit is therefore in time in respect of this item and as there is no other point the lower court's decree will be modified by excluding items 1 and 2 and retaining item 3 with costs throughout on the proportionate value of that item, the amount to be paid by the plaintiff being reduced from Rs. 146 to Rs. 21.

A. V. V.

Decree Modified.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE RAMESAM.

Sankaranarayana Pillai and others ... *Appellants* * (*Petitioners L. Rs.*)

v.

Puthiya Vettil Thangamma and
another ... *Respondents.*

Sankara-
narayana
Pillai
v.

Puthiya
Vettil
Thangamma
and others.

Limitation Act, Art. 182 (5)—Step in aid of execution—Decree for redemption—Application by a mortgagor for extension of time for depositing the redemption money into court—Whether mortgagor is entitled to ask for the sale of mortgaged property in a redemption decree

An application by a mortgagor for extension of time for depositing the redemption money into Court in the case of a redemption decree is an application to take a step in aid of execution of the decree under Article 182 (5) of the Limitation Act.

It makes no difference for this purpose if the application is not granted.

* A. A. O. No. 28 of 1920.

1, I. L. R. 21 Mad 134

23rd February 1921.

2 I. L. R. 9 Mad 175.

The nature and requisites of a step in aid of execution considered and discussed. *Abdul Kadir Rowther v. Krishnan Malanal Nair* 1. referred to.

An application to take a step in aid of execution need not necessarily be one made when an execution application is pending.

Where a decree for redemption has been passed it is open to the mortgagor to execute the decree by applying for sale. *Govinda Taragar v. Veeran* 2. *Abdul Khadir v. Samipandya Tevar* 3. *followed*.

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narayana
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v,
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Vettil
Thangamma
and others.

Appeal against the order of the Court of the Subordinate Judge of South Malabar at Calicut in Appeal No. 49 of 1919 (A. S. No. 173 of 1919 on the file of the District Court) preferred against the order of the Court of the Principal District Munsif of Calicut in E. P. No. 102 of 1918 in O. S. No. 794 of 1910.

T. R. Ramachandra Iyer and *A. S. Venku Aiyar* for appellants.

K. Kuttikrishna Menon, for respondents.

The Court delivered the following

Judgment :—*Spencer, J.* :—The decree that was passed by the District Munsif upon this suit for redemption, though styled a preliminary decree and passed under the Code of Civil Procedure, 1908, provided for sale of the mortgaged properties if the money required for redemption was not paid by a certain date. There was thus no need for any one to apply for an order for sale. But in a redemption suit, the decree-holder being the mortgagor, it has been held in *Govinda Taragan v. Veeran* 2 C. M. S. A. No. 99 of 1915 and *Abdul Kadir v. Samipandya Tevar* 3 that he as well as the mortgagee has a right to execute the decree by applying for sale and I think we should follow those decisions.

Spencer, J.

As regards the applications on 4-4-1916 and 23-6-1916 for an extension of time for depositing the redemption money in Court, it may be conceded that they did not aid the particular form of execution which has ultimately been reached, but if they were *bona fide* they may well be said to have been in aid of that portion of the decree which related to redemption and I think the decree must be treated as a whole and not split up into sections. This is the view taken in a recent decision (S. A. No. 2405 of 1917.) to which I was a party. If they were in any sense aids to executions they should be treated as steps in aid of execution.

1. (1913) 1 L. R. 38 Mad. 695 : 26 M. L. J. 433.

2. (1911) 1 L. R. 36 Mad. 32 : 21 M. L. J. 941.

3. (1920) 1 L. R. 43 Mad. 835 : 39 M. L. J. 941.

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Thangamma
and others.
—
Spencer, J.

In *Abdul Kadar Rowther v. Krishnan Malaval Nair* ¹ Sadasiva Aiyar, J. observed that an application by the decree-holder to give time to the judgment debtor *merely as a matter of grace* would be a step in retardation. In the present case the applicant though he was the decree-holder was the person who had to pay and he was applying for time not as a matter of grace to a judgment-debtor but in order the better to enable himself to execute the decree, the execution of which would have been completed as soon as the redemption money was paid.

The Subordinate Judge in appeal made the comment on these applications that it could not be said that they were made in execution. The law only requires that they should be applications in accordance with law to the proper court and they appear to have been that.

I therefore agree with my learned colleague that this appeal should be allowed with costs in both courts.

Ramasam, J.

Ramasam, J. :—This is a matter arising in execution of a decree for the redemption of a usufructuary mortgage in South Malabar. The final decree of the High Court, dated 16th October 1913, allowed three months' time for redemption. The three months expired on the 16th (not 15th) January 1914. In his present application, dated 22-12-17 the decree-holder (Plaintiff) applied for sale.

It has been held in *Nani Nair v. Kandan Ashtamoorthu Nambudripad* ² that, in cases falling under the Malabar Tenants' Improvements Compensation Act, the provisions in O. 34, Civil Procedure Code, are modified by S. 6 of that Act in so far as they are inconsistent with the latter, and that under the local act, only one decree in redemption suits need be passed. This was also acted upon by the Subordinate Judge in an earlier stage of the proceedings of this case. In this view, the question decided in *Govinda Taragan v. Veeran* ³ C. M. S. A. No. 99 of 1915, and *Abdul Kadir v. Samipandaiya Tevar* ⁴, whether a mortgagor who obtained a decree for redemption can apply for sale, when no final decree is passed under O. 34 R. 4 which enables the mortgagee only to apply for the passing of a final decree does not arise, though

1. (1918) I. L. R. 38 Mad. 695.

2. (1918) M. W. N. page 551.

3. (1911) J. L. R. 36 Mad. 32

4. (1920) I L. R. 48 Mad. 335.

I may add that, if it arises, I am inclined to follow those decisions and do not share the doubts expressed by Seshagiri Aiyar, J. in the last of them.

But it has also been pointed out in the same case *Nani Nair v. Kandan Ashtamoorthi Nambudripad*¹ "Provisions like directions for sale in default, allowing time to pay moneys declared as due and so on, not inconsistent with the Improvements Act and directed or allowed by the New Civil Procedure Code to be mentioned in decree for redemption or ejectment can, of course, be mentioned in decrees passed in suits falling under the Compensation Act also."

It follows that the mortgagor is entitled to apply for extension of the time allowed to him in the decree for redemption. In this case, two such applications were filed by the decree-holder on 4-4-1916 and 23-6-1916. The District Munsif held that they operated as steps in aid of execution and saved the present application from being barred by limitation. The Subordinate Judge reversed the order of the District Munsif on the ground that they were not in aid of the execution because (1) the applications were not made when any execution application was pending and it cannot be said that they were made in execution (which is true), and (2) they retard execution and not aid it.

In my opinion there is no warrant for the view that an application to take a step in aid of execution should be made in execution and no authority has been cited by the Subordinate Judge or the learned Vakil for the respondent in its support.

On the second ground also, I am unable to agree with the learned Subordinate Judge. Ordinarily, it is the judgment debtors that have to pay or do some act under decrees in order to avoid sale, and applications by them for extension of time, retard execution and do not aid it. But it does not follow that, in redemption decrees and similar decrees, where the decree-holder has to pay before obtaining execution and asks for extension of the time allowed to him for payment, such application does not aid him though it may retard execution of the decree. It aids him in the execution of the portion of the decree relating to redemption which he cannot get without extension of the time (see *Pitam Singh v. Tota Singh*²). As my learned brother observed in the course of the argument late

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Ramesam, J.

1. (1918) M. W. N. 551 at 553.

2. (1907) I. L. R. 29 All. 301 p. 302.

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redemption is better than no redemption. It may be that those applications do not aid the particular kind of execution now sought, *viz.*, sale which was a relief granted as alternative to the relief of redemption. It is enough that they aid the decree-holder in the execution of some portion of the decree; *vide*, *Kalidas Manekchand v. Varjivan Rangji*,¹ especially when that is the primary object of the decree-holder, even though, in the events that happened, the decree-holder did not derive the assistance sought. In my opinion the proper test in deciding such a question is whether the step aids the execution. The other test is, *viz.*, whether it accelerates or retards execution (see *Kartick Nath Pandey v. Jagannath Ram Marwari*² and *Abdul Kadir Rowther v. Krishnan Malaval Nair*³.) Though in many cases it amounts to the same thing, may in some cases (such as this) turn out to be fallacious.

I would reverse the order of the Subordinate Judge and restore that of the District Munsif with costs here and in the Lower Appellate Court.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS.

Rentala Veerrazu ... Petitioner. * (2nd Respondent)

v.

Kuruvella Subharayudu and
another ... Respondent (3rd and 4th petitioners.)

Civil Procedure Code, Ss. 48 and 115—Execution—Fresh application—Continuation of pending execution—Revision—Error of law—Remedy by suit open to aggrieved party.

Where owing to circumstances beyond the control of the decree holder execution proceedings are interrupted and are removed to a superior court, an application to the latter court for relief is not a "fresh application" for execution within the meaning of S 48 of the Code. *Muhamad Nabi v. William Alfred Thomas* (4) Relied on.

Where a remedy by suit is open to an aggrieved party the High Court would be very slow to interfere in revision. *Sri Krishna Doss v. Chandook Chand* (5). Referred to.

Petition under S. 115 of Act V. of 1908 and S. 107 of the Government of India Act praying the High Court to revise the

* C. R. P No. 284 of 1920.

28th February, 1921.

1. (1898) I. L. R. 15 Bom. 245 note.

2. (1899) I. L. R. 27 Cal. 285.

3. (1913) I. L. R. 38 Mad. 695.

4. (1913) 21 I. C. 923.

5. (1909) I. L. R. 32 Mad. 374.

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Kuruvella
Subharayudu
and others.

Order dated 7th October 1919 of the District Court of Godavary at Rajamundry in E. P. No. 25 of 1919 in C. S. No. 200 of 1904 on the file of the Court of the Principal District Munsif of Rajamundry.

B. Salyanarayana for Petitioner.

P. Narayanamurthi for Respondents.

The Court delivered the following

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v.
Kuruvela
Subharayudu
and others.

Judgment :—In this petition I am asked to revise the order of the District Judge of Godavari directing a rateable distribution of the proceeds of a sale of property held on the 21st March, 1919 by the District Court. The petitioner obtained a decree in O. S. No. 31 of 1903 on the file of the District Court of Godavari. The counter petitioners obtained a decree in O. S. No. 200 of 1904 on the file of the Principal District Munsif's Court, Rajamundry, against the same judgment-debtor. Under the provisions of S. 63 (1) of the Code of Civil Procedure, the attached properties were brought to sale in the District Judge's Court, the District Munsif, in the meantime, stopping the sale in his court and adjourning the execution petition put in before him pending the disposal of the matter by the higher court.

I am asked to revise the order of the District Judge on two grounds :—First, that the District judge erred, in entertaining an application, dated the 31st January 1919, put in by the counter petitioners asking for rateable distribution. The point is that the application when made on the 31st January 1919 was over 12 years from the date of the decree, *i. e.*, the 1st August 1904 unless the proceedings before the District Court can be regarded as a continuation of those before the District Munsif's court, before which latter Court there is no doubt that there was an execution petition pending at the time when the proceedings were removed to the District Court by operation of S. 63; and also, by the order of the District Munsif's Court dated the 30th January 1919, directing that the decree copy and the execution record should be sent to the Court of the District Judge.

The learned Vakil for the petitioner on these facts urges that under S. 48 of the Code of Civil Procedure, the application dated the 31st January 1919 is barred as it was over 12 years old.

Now, the first remark to be made on this petition is that the Court is very slow to interfere in revision where there is a

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and others.

separate remedy open. See *Sri Krishna Doss v. Chandookchand* ¹ and *Subbiah Pillai alias Subramania Pillai v. Kailasam Pillai* ²; also *A. Gaeble v. Ramayi Ammal* ³. The Privy Council has laid down the scope of S. 115 in *Bala Krishna Udayar v. Vasudeva Aiyar* ⁴ where their Lordships say that "the section applies to jurisdiction alone, the irregular exercise or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved." Here the learned District Judge has held that the application to him is but an incidental application in furtherance of the execution proceedings still pending in the District Munsif's Court. He may be 'wrong, but the fact that his decision is wrong is no ground for revision. See *Amir Hassan Khan v. Sheo Baksh Singh* ⁵, *Koppaka Chandrayya v. Robertson* ⁶ per Seshagiri Aiyar, J. and *Ponnuramgam Pillai v. Lal Khan Sahib* ⁷ per Oldfield, J. where it was held that a wrong exercise of jurisdiction was no ground to interfere.

The learned Vakil for the petitioner has not been able to show me any authority to the effect that the learned District Judge was wrong in coming to the conclusion that the application before him was not a new application within the meaning of S. 48 of the Code of Civil Procedure. In fact the ruling in *Muhammad Nabi Riza v. William Alfred Thomas* ⁸ seems to support the opposite view. There it was pointed out that the theory of continuation applies only where the previous application has been interrupted by reason of circumstances ever which the decree-holder had no control. The theory was applied in that case and it seems to me that this is pre-eminently a case in which the theory should be applied. It cannot be said to have been owing to any circumstance under the control of the counterpetitioners that the proceedings were removed under S. 63 of the Code of Civil Procedure to the Court of the District Judge.

The second ground urged before me is practically a repetition of the first, that the District Judge wrongly assumed jurisdiction in holding that the application before the District Munsif was continued by the application before the District

1. (1909) I. L. R. 32 Mad. 334.

2. (1914) 1 L. W. 905.

3. (1913) 1 L. W. 232. 4. (1917) I. L. R. 40 Mad. 793 at p. 799 : 33 M.L.J. 69.

5. (1884) I. L. R. 11 Cal 6.

6. (1919) 52 I. C. 641.

7. (1917) 37 I. C. 348.

8. (1913) 21 I. C. 923.

Judge. I am of opinion that the District Judge is right. Section 48 of the Code of Civil Procedure says that no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of 12 years. The application before the District Judge was fresh, only in the sense that it had not been before the District Court before, for the very sufficient reason that the proceedings in which the counter-petitioners were interested were not removed to that Court till the day before the application was made to me. These are not in my opinion, fresh proceedings within the mischief of the section. It would be most inequitable that the decree-holder, while prosecuting his remedy in the proper Court, (in this case the Court of the District Munsif) where he has an execution petition pending within time, should be deprived of his remedy, simply by reason of circumstances over which he had no control. The proceedings were removed into the Court of the District Judge, to which Court he makes an application at the earliest opportunity for rateable distribution.

Rentala
Veerrazu
v.
Kuruvella
Subharayudu
and others.

For all these reasons, in my opinion, the order of the District Judge is correct and this Civil Revision Petition must be dismissed with costs.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER, AND MR. JUSTICE RAMESAM.

Pattani Valappil Payyanatan

Krishnan and others ...

*Appellants * (Defendants
12 to 15).*

v.

Manalil Inkirias Govindan

and others ...

*Respondents (Plaintiffs
1, 2, 4 to 24 Defendants 1 to 4, 7 to
11 and 16 to 23.)*

Malabar Law—Sale of tarwad property—Necessity for the sale to the extent of a substantial amount—Sale should be upheld—Purchaser when and whether can be compelled to account for application of sale proceeds or pay the price to the junior members,

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v.
Govindan

Where the major portion of the consideration for a sale by the Karnavan of a Malabar tarwad is found to be for binding purposes, the proper course for courts to follow is to uphold the sale instead of directing it to be set aside on condition of

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the tarwad paying the amount for which necessity is proved. *Thalagara Ramanna v. Kalagare Gangayya* (1) and *Kannan Chetty v. Amirithammal* (2) and *Asa Varada Seshamma v. Bava Venkatakrishnarayanam* (3) followed. *Kunhamma Ummah v. Ibrahim Haji* (4) and *Padammah v. Themana Ammal* (5). S. A. No. 782 of 1919 distinguished.

In the absence of proof of any fraud or collusion on the part of the purchasers of tarwad property, they cannot be compelled to account for the application of the sale proceeds or to pay any part of the price twice over.

The Karnavan of the tarwad being the person invested with the management of the moveable property of the tarwad, the other members are not entitled to demand the payment of the purchase money into their hands,

Subramania Pattar v. Krishna Embrandari (6) referred to.

Second Appeal and the Memorandum of Objections filed by the 1st respondent against the decree of the Court of the Temporary Subordinate Judge of Tellicherry in Appeal Suit No. 10 of 1918 preferred against the decree of the Court of the Principal District Munsif of Tellicherry in O. S. No. 241 of 1914.

C. V. Anantha Krishna Aiyar for Appellants.

K. P. M. Menon for 1 and 5 Respondents.

The Court delivered the following

Spencer, J.

Judgments :—*Spencer, J.*—As it has been found that there was necessity for the sale to the extent of a substantial amount (*viz*) Rs. 1001, out of Rs. 1400, the proper course for the Courts to follow was in my opinion to uphold the sale instead of directing it to be set aside on condition of the plaintiffs paying the amount for which necessity was proved.

This is the effect of the decisions in *Thalagara Ramanna v. Kalagare Gangayya* ¹ *Kannan Chetty v. Amirithammal* ² and *Asa Varada Seshamma v. Bava Venkatakrishnarayanam* ³.

For the respondents Mr. K. P. M. Menon relied on decisions in *Kunhamma Ummah v. Ibrahim Haji* ⁴ and *Padammah v. Themana Amma* ⁵ and Second Appeal No. 782 of 1919 (unreported) but those were cases of mortgages and in such cases different considerations arise from those which arise in cases of sales.

It was next contended for the respondents that the appellant should be made to pay over again the difference between

1. (1913) 27 M. L. J. 132.

2. (1916) 33 I. C. 838.

5. (1897) 1 L. R. 17 Mad. 232

2. (1914) 1 L. W. 877.

4. (1913) 12 M. L. T. 264

6. (1920) 39 M. L. J. 590.

the amount shown to be for necessity and the whole sale price as they did not pay the purchase money into the hands of all the tarwad members.

The 6th defendant who joined in the sale is the Karnavan of the tarwad and he is by his office invested with the management of the moveable property of the tarwad (See *Subramaniya Pallar v. Krishna Embranderi* ¹).

In the absence of proof of any fraud or collusion on the part of the purchasers they cannot be compelled to account for the application of the sale proceeds or to pay any part of the price twice over.

The appeal is therefore allowed and the Lower Court's decree will be reversed and the suit dismissed with costs throughout. The memo of objections is not pressed and is dismissed.

Ramesam J :—I agree. The major portion of the consideration having been found to be for necessary purposes this is a case, in which the whole transaction ought to be upheld. See *Thalagara Ramama v. Kalagare Gangayya* ², *Kannan Chetty v. Amirithamnal* ³, *Felaram Roy v. Bagalanand Banerjee* ⁴ and *Viswanatha Sastrigal v. Valambal Ammal* ^{*}. The cases relied on by Mr. Menon the learned Counsel for the respondents, *Kunhamma Umma v. Ibrahim Haji* ⁵ and *Padammah v. Themana Ammah* ⁶ are cases of mortgage and have no bearing on cases of sale. The decision in S. A. No. 1597 of 1914 goes to the length of holding that, even in a case of mortgage, the original transaction would be affirmed, subject to an equity in favour of the plaintiffs in respect of the portion which was found not to be justified by necessity.

It is next contended by Mr. Menon that the plaintiffs should obtain a refund of the difference between the consideration in the sale deed and the amount found to be required for necessary purposes and he relied on *Thalagara Ramana v. Kalagare Gangayya* ² S. A. No. 1597 of 1914, S. A. No. 782 of 1919, *Rukmani Sundaranimal v. Muthu Animal* ⁷, S. A. No. 1814 of 1918 and 33 I.C. 833. The first two are cases of mortgage and considerations different from those applying to sale arises. In

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Spencer, J.

Ramesam, J.

1. (1920) 39 M. L. J. p. 590.

2. (1913) 27 M. L. J. 132.

3. (1914) 1 L. W. 877.

4. (1910) 14 Cal. W. N. 895.

5. (1912) 12 M. L. T. 264.

6. (1897) 1 L. R. 17 Mad 232 at 234.

* Since reported in (1919) 62 I. C. p. 701.

7. (1915) M. W. N. 8.

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v.
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—
Ramesam, J.

Rukmani Sundarammal v. Muthu Ammal ¹ the sale was not affirmed and the remarks about refunding the amount of the consideration not shown to be for necessary purposes were not necessary for the decision. In *Thalagara Ramanna v. Kalagare Gangayya* ² and 33 I. C. 833 the point was not argued but was conceded by the appellant's vakils who succeeded in getting the main transaction affirmed. In *Viswanatha Sastrigal v. Valambal Ammal* ^{*} the point does not seem to be argued. In the case of alienation by widows where the sale is found to be for necessity, the mere fact that a portion of the consideration was not required does not justify the purchaser in withholding it from the hands of the widow who is certainly the owner for the time being of the estate she was dealing with though her powers may be limited. The cases in *Kannan Chetty v. Amirithammal* ³ and *Felaram Roy v. Bhagaland Banerjee* ⁴ where the plaintiff's suits were wholly dismissed justify this view. Even in the cases of guardians (of minors) trustees, managers of joint families the same considerations apply. So long as there is nothing suspicious in the management they are the proper persons to receive the consideration for the sales of the immoveable property belonging to the minors, *cestui que trust* and the joint members respectively. There is no reason ordinarily justifying the withholding of the payment from their hands. These considerations become stronger in the case of a Karnavan of a Malabar Tarwad—See *Subramania Pattar v. Krishna Embranderi*. ⁵ In this case the Karnavan and five other members effected the sale and the Subordinate Judge found that they were the persons actually dealing with the family property. I concur with the order purposed by my learned brother.

C. A. S.

Appeal allowed.

1. (1915) M. W. N. 8.

^{*} Since reported in (1919) 62 I. C. p. 701.

4. (1910) 14 C. W. N. 895.

2. (1913) 27 M. L. J. 8.

3. (1917) 1 L. W. p. 877.

5. (1920) 39 M. L. J. 590.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Nagiah
v.
SeshammaPRESENT :—MR. JUSTICE SPENCER, AND MR. JUSTICE
RAMESAM.Tarigopala Nagiah ... Appellant * (1st respon-
dent 1st defendant.)

v.

Kommineni Seshamma and others... Respondents (Plaintiff
appellants and supple-
mental appellants).

C. P. Code Order 20 Rule 1—Posting of a notice on a notice board
announcing the result of an appeal—Whether sufficient compliance with the rule
—Judgment not delivered—Petition of compromise—Court should receive and
pass necessary orders.

The posting of a notice on the notice board of the Court announcing the result
of an appeal is not a sufficient compliance with the requirements of Order 20 Rule
1 of the Code of Civil Procedure as to the pronouncement of judgments in open
Court. *Bai Dahi v. Hargovan Das* (1) approved.

Where after the hearing of an appeal and when it is still pending for want of a
delivered judgment, a petition for compromise is presented the Court has to receive
the petition and pass the necessary orders thereon.

Appeal against the order of the District Court of Guntur
dated 17th March 1920 in I. A. No. 282 of 1920 in A. S. No.
311 of 1919, declining Jurisdiction to pass a decree in terms of
a rajinama petition filed by both parties.

V. Ramadoss for appellant.

P. Narayanamurthi and G. Krishna Arya for respondents.

The Court delivered the following

Judgment :—We do not consider that the posting of a
notice upon the notice board of the Court announcing the
result of the appeal was a sufficient compliance with the re-
quirements of Order XX R. 1, of the Code of Civil Procedure
as to the pronouncement of judgments in open court.

We agree with the view taken by the Bombay High Court
in *Bai Dahi v. Hargovan Das*¹ that a practice of omitting to
pronounce judgment in open court is both inconvenient to the
parties and in direct opposition to an express provision of the
law.

When the vakils addressed the District Judge on Monday
the 15th March 1920 as to the appeal, the appeal was still
pending for want of a delivered judgment. The District Judge

* A. A. O. No. 239 of 1920.

27th July 1921.

1. (1906) I. L. R. 30 Bom. 155.

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Seshamma

had thus jurisdiction at that time to receive a petition of compromise and to pass the necessary orders upon it. His order declining jurisdiction must now be set aside; and he is directed to take the petition on file and dispose of it according to law.

Costs of this Civil Miscellaneous Appeal in this Court will be borne by respondents.

C. A. S.

Order set aside.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS, AND MR. JUSTICE OGGERS,

Killi Latchamma and another *Appellants (Defendants Nos. 1 and 2).*

v.

Latchamma
v.
Appanna.

Killi Appanna and others *Respondents (Plaintiffs)*

Specific Relief Act—S. 42—Hindu Law—Reversionary right—Declaration of Grant of—Declaration merely incidental to declaration of validity of adoption of alleged last male owner—Effect.

Plaintiffs the sons of one of two brothers, sued the widow and daughter of the other, for a declaration that P was the validly adopted son of their uncle, that they (plaintiffs) were the reversionary heirs of P and that an alienation made by the widow of their uncle was not binding upon them. The widow, plaintiffs alleged acting in collusion with her daughter denied the validity of P's adoption. The courts below found that the alienation by the widow was valid, but nevertheless granted the other declarations prayed for. *Held*, that the denial by the widow of the truth and validity of P's adoption being a danger to the inheritance, the suit to establish the adoption was maintainable under S. 42 of the Specific Relief Act, and that the plaintiffs were entitled to the incidental declaration that they were the presumptive reversioners of P.

Second Appeal against the decree dated 22nd December 1919 of the District Court of Ganjam at Berhampore in A. S. No. 205 of 1919 preferred against the decree of the Court of the Temporary Subordinate Judge of Ganjam at Berhampore in Original Suit No. 62 of 1917.

P. Narayana Murthi for appellant.

T. Varadarajulu Naidu and *T. Sundara Rao Naidu* for respondent.

The Court delivered the following

Phillips, J.

Judgments :—*Phillips J.*—The plaintiffs in this suit are the sons of two brothers and the defendants 1 and 2 are widow and daughter respectively of another brother named Musalayya. These brothers were divided and Musalayya after adopting one

Poluvadu died. Poluvadu also died and his widow remarried. The 1st defendant his adoptive mother obtained possession of the estate of her son. The plaintiffs sue as the reversioners of the deceased Poluvadu and ask for a declaration that Poluvadu's adoption was valid, that they are the reversionary heirs and that an alienation made by the 1st defendant is not binding upon them. The lower courts have found that the alienation was valid because it was an alienation of property forming the 1st defendant's stridhanam but they have granted the declarations as prayed for.

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Appanna
—
Phillips, J

It is now contended for the defendants (appellants) that, inasmuch as the substantial relief asked for, namely, the declaration that the alienation is invalid, cannot be granted, the plaintiffs are not entitled to the other declarations. It may here be stated that the plaintiffs really base their suit on an alleged denial by the 1st defendant in collusion with the 2nd defendant that Poluvadu had been adopted and the declaration as to the validity of the adoption is the main prayer in their plaint. It is however argued in appeal that this question of adoption is merely subsidiary to the question of plaintiffs' right to be considered reversionary heirs and that their right as reversioners has to be proved through the adoption. No doubt if this were so and the chief relief asked for were the declaration as to the reversionary right the decree could not be upheld. The question has been considered recently by the Judicial Committee in *Venkatanarayana Pillai v. Subbammal* ¹, *Janaki Ammal v. Narayanaswamy Iyer* ² and *Sandagar Singh v. Pardip Narayan Singh* ³. The effect of these decisions appears to me to be that when reversioners sue for a declaration of their reversionary right such a suit will not lie except when such declaration is incidental to some other relief which they can claim and this is the view of those decisions which has been taken by another Bench of this court in *Navaneetha Krishna Thevan v. Ramasami Pandia Thalavar* ⁴.

We have, therefore, in this case to see whether the declaration as to the reversionary right is the main prayer in the plaintiffs' suit or whether it is merely incidental to the declaration as to adoption. Under S. 42 of the Specific Relief Act the Court is empowered in its discretion to make a declaration in

1. (1915) I. L. R. 38 Mad. 406

2. (1916) I. L. R. 39 Mad. 634

3. (1917) I. L. R. 45 Cal. 510.

4. (1916) I. L. R. 40 Mad. 871

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Appanna
—
Phillips, J.

favour of any person entitled to any legal character, or to any right as to any property. It is I think clearly established now that reversioners can bring a suit for a declaration in certain circumstances and for that purpose they must be deemed to be persons having a right to property within the meaning of S. 42 viz., to the estate to which they are the reversioners and in *Venkatanarayana Pillai v. Subbammal*¹ two kinds of suits which can be brought by them are specified, namely, suits to set aside an adoption by a widow and suits to set aside an improper alienation of the estate, and the Judicial Committee remarked that in both these cases the right to sue is based on a danger to the inheritance common to all the reversioners. Under illustration (f) to S. 42 a suit can be brought by a reversioner to declare an adoption by a widow invalid. The present suit is merely the converse of that but it is contended for the appellants that the converse suit is not of the same nature as a suit to set aside an adoption the argument being that an adoption, by a widow devolves the property immediately on the adopted son and that gives a right to the reversioners to sue; but it may be pointed out that when there has been an adoption as has been found to be the case here, a denial by the widow of the truth and validity of such adoption is a danger to the inheritance. If that denial is persisted in possibly for a long series of years until the widow finally dies, it may then be impossible for the reversioners to prove that an adoption actually took place and the effect of the adoption being declared invalid would be to alter the succession to the estate, for the last male holder would then be the father instead of the adopted son and if the father is the last male holder his daughter would be in the line of inheritance and if she had a son the estate would devolve on him to the exclusion of the father's own brothers or nephews—in this case, the plaintiffs. The result, therefore, of the denial by the 1st defendant of the validity of the adoption might be that the estate would on her death devolve on her daughter and daughter's son thus excluding the plaintiffs who would be entitled to come in after the first defendant if Poluvadu had really been adopted. To allow this denial of the 1st defendant to pass unnoticed would undoubtedly be a danger to the estate, for in cases like adoption and so on it is advisable that the factum should be determined as near the date of the adoption

1. (1915) I. L. R. 38 Mad. 406

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possible and therefore, the plaintiffs are justified in bringing the suit now to declare the adoption valid one of the reasons being that the suit is valuable as perpetuation of evidence as otherwise it might not be available when the reversion falls in. This suit is not really a conflict as suggested by the appellants between two sets of reversioners as in *Rama Rao v. The Rajah of Pittapur*,¹ but it is really a suit to establish finally the identity of the last male holder and thereby to ascertain in which family are to be found the general body of reversioners. It is of course possible that the 2nd defendant might die without a son in which case the plaintiffs would be the reversioners after her death but in view of the possibility of her having a son there is undoubtedly a danger of the estate being diverted from its proper course. By establishing the validity of adoption the estate devolves in one way, whereas if there had not been an adoption the estate might devolve in another and might be diverted from the proper heirs. The Subordinate Judge has actually found that this suit was brought by the plaintiffs in consequence of the denial of the adoption by the 1st defendant and a perusal of the plaint shows that this is so. The alienation complained of was of property the value of which bears a very small proportion to the whole estate and the alienation took place many years before the suit was brought. I think here the plaintiffs have brought this suit primarily to establish the factum of adoption and secondarily to set aside the alienation. I therefore can see no reason why this suit to establish the adoption should not lie under S. 42 of the Specific Relief Act, and if it does lie, the declaration that the plaintiffs are the presumptive reversioners is merely an incidental declaration following on the factum of adoption.

For these reasons I think that the lower courts are right and dismiss the second appeal with costs.

Odgers J :—The suit was for two declarations (1) that Poluvadu was the adopted son of Musalayya and the plaintiffs are the reversionary heirs of the former, (2) that the alienation by the first defendant (adoptive mother of Poluvadu) is invalid and does not bind the plaintiffs as reversioners. The plaintiffs are the sons of brothers of Musalayya. The latter having no son adopted his brothers son Poluvadu. Poluvadu died 20 years before the suit and his widow having remarried,

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—
Odgers, J.

first defendant succeeded as his adoptive mother and the second defendant is her daughter. It is not disputed that the plaintiffs are reversionary heirs if the adoption is valid. It is also not disputed that they would be more distant reversionary heirs if the adoption were in fact invalid, provided second defendant had no son. The adoption was declared to be valid by both the lower courts who also found in favour of the alienation by the first defendant and granted the first declaration above set out. On these facts it is contended first for the appellants that as the reversionary right can only be proved by proving the adoption and as the reversionary right cannot be decreed, therefore the adoption cannot be decreed. This proposition was based on *Janaki Ammal v. Narayanaswami Aiyar*¹ which laid down that as waste, misappropriation etc., by the limited owner had not been proved, the plaintiff was not entitled to a declaration as to his reversionary right, even though it had been disputed, under cover of 'further relief' in the plaint when the substantial heads of his claim had failed.

It was also held that in that case that heirs with rights differing little from *spes successionis*, had a right to demand that the estate be kept intact for the class of reversioners whoever they might ultimately turn out to be. (cf also *Balbhaddar Prasad v. Prag Datt*².)

This case is essentially different from the one before us. The substantial heads of claim here are declarations both as to adoption and as to the alienation; the latter was comparatively unimportant. What was important for the plaintiffs was to have the adoption established while evidence was available which had been denied by the first defendant.

As pointed out by Mr. Collett in his notes to S. 42 Specific Relief Act in order to found a suit for a declaratory decree relating either to some legal character or some right in property the essentials are that there should be some present existing interest, however distant the possibility of its coming into actual possession and enjoyment may be, and secondly there must be some present danger or detriment to such interest.

It seems to me both these essentials exist here and this is supported by illustration (f) to the section. Such a suit

1. (1916) I. L. R. 39 Mad. 684

2. (1919) I. L. R. 41 All. 492.

may or may not involve a declaration that the plaintiffs are the reversionary heirs.

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v
Appanna
—
Odgers, J.

As pointed out by the Privy Council in *Saudagar Singh v. Pardip Narayan Singh* ¹ a suit following illustration (e) must always involve such a declaration.

In *Katama Nachiar v. Dora Singa Tevar* ² it was laid down by the Privy Council "there can be no declaratory decree unless there is a right to consequential relief" and *Navaneetha Krishna Thevar v. Ramaswami Pandiya Thalavar* ³ held that reversioners are not entitled to a decree that they are the next reversioners unless the question is incidental to the grant of some other relief to which they may be entitled. Here the plaintiffs are unquestionably entitled to bring a suit for a declaration as being next reversioners provided the adoption was also declared to be valid.

It is really incidental to the other relief claimed in *Venkatanarayana Pillai v. Subbammal* ⁴. The Privy Council says "it is the common injury to the reversionary rights which entitles the reversioners to sue. Apart, therefore from the question whether 'the next presumptive heir' is 'the legal representative' of the deceased presumptive reversioner there remains the outstanding fact of identity of interest on the part of the general body of reversioners near and remote to get rid of the transaction which they regard as destructive of their rights."

Here the words apply the transaction being the denial by the first defendant of the adoption. The second objection by the appellants is that the adoption does not affect all the reversioners. It certainly affects all the reversioners who would be displaced or postponed if the adoption were invalid. In cases under illustration (f) to S. 42 (Specific Relief Act) there will obviously be two sets of reversioners, those entitled if the adoption is upheld and those entitled if the adoption is declared invalid. Moreover as in this case the plaintiffs might be entitled to succeed the more remotely, even if the adoption were declared invalid it appears to me that there is no force in the contention. The declaration sought is in reality as to the identity of the last male holder.

1. (1917) I. L. R. 45 Cal. 510

2. (1875) 2 I. A. 169 at page 191

3. (1916) I. L. R. 40 Mad. 871.

4. (1915) I. L. R. 38 Mad. 406 at page 412 the P. C.

For these reasons I would dismiss this second appeal with costs.

A. S. V. *Second Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE OLDFIELD AND MR. JUSTICE RAMESAM.

Anakkaran Puthiavalappil Mussan Haji ... *Appellant (Plaintiff.)*

v.

Thiyan Thavara Koran and others ... *Respondent Defendants.*

Mussan Haji
v.
Thavara
Koran.

C. P. C of 1908—S. 11—Res Judicata—Lessor and Lessee—Decision against lessor—Binding nature against lessee—Lease prior to suit against lessor—Lessee not party thereto—Effect

A lessee under a lease granted before a suit brought by or against his lessor is not bound by the decision therein against the latter, if he (the lessee) was not himself a party to the suit.

Appeal against the decree of the District Court of North Malabar in A. S. No. 595 of 1916, preferred against the decree of the Court of the District Munsif of Taliparamba in O. S. No. 456 of 1910.

B. Pocker for appellant.

C. Madhavan Nair for 11th respondent.

V. P. Karunakara Nambiar for respondents 2 to 8 and 12.

The Court delivered the following

Oldfield, J.

Judgments:—*Oldfield, J.*—The Lower Appellate Court has so far decided the case against the plaintiff-appellant, because it answered in the affirmative the question whether a person holding under a lease granted before a suit is bound by the decision against the lessor in that suit, although he is not a party to it. We cannot follow the Lower Appellate Court in this; and in fact the only support adduced for its opinion is the question from an American author in *Seshappaya v. Venkatramana Upadya*¹. But the portion of that quotation at present material was not so for the purpose of the issue in that case and the learned Judges in fact, after observing that it was inconsistent with the principle of English, Irish and Indian Cases declined to decide as to its correctness. On the

¹ S. A. No. 1142 of 1920.

28th April 1921.

1. (1899) I. L. R. 23 Mad, 459.

other hand, although no case of tenancy has been shown to us, the principle applied to other cases of transfers in *Sita Ram v. Amir Begum* ¹ *Jey Chandra Banerjee v. Sreenath Chatterjee* ² *Abdul Ali v. Miakhan Abdul Hussain* ³ and *Ramachandra Dhondo v. Malkappa* ⁴ is in accordance with plaintiff's contention. Adopting that principle, we must set aside the Lower appellate Court's decree and remand the appeal to it for further hearing on its merits. Costs to date here and in the Lower Appellate Court will be provided for in the decree to be passed. Stamp value will be refunded on application.

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Koran.
Oldfield, J.

Ramesam, J. :—I will only add that an illustration of the principle of privity by subordination Bigelow gives (6th edition at page 160) is the common law case of feoffor and feoffee. This he says is Coke's illustration. Then he mentions the case of land-lord and tenant for which no authority is cited. On the other hand Black on Judgments Vol. II S. 549 states the law in the other way citing *Satterlee v. Bless* 36 Cal. so that even in America it is doubtful whether the law as to landlord and tenant is as stated by Mr. Bigelow. All other authority is against it. I agree in the order of my learned brother.

Ramesam, J.

A. S. V.

Appeal allowed and case remanded.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN, AND MR. JUSTICE ODGERS.

Anthaya Hegade and another.

... *Appellants (Defts)*

v.

Manjaya Shetty

... *Respondent (Plaintiff).*

Civil Procedure Code S. 64 and O. 21 Rr. 46 and 64—Benamidar—Payment of debt to—Knowledge of benami character of the transaction—Real owner when affected—Attachment of debt—Claim—Suit by decree holder under O. 21, R. 63—Decree—Reversal of attachment—Intermediate payments not binding on decree holder.

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A payment to a *benamidar* in discharge of a bond standing in his name binds the real creditor in the absence of any prohibition against such payment by the real creditor. Mere knowledge on the part of the debtor of the benami character of the transaction does not prevent the payment from taking effect as a valid discharge of the debtor's liability under the bond. *Singa Pillai v. Govinda Reddi*, 5, referred to.

Where a debt is attached in execution of a decree and on a claim being preferred the attachment is raised, the release from attachment is only provisional and

1. (1886) I. L. R., 8 All. 324.

2. (1904) I. L. R. 32 Cal 357.

3. (1911) I. L. R. 35 Bom 297

4. (1916) I. L. R. 40 Bom. 679

5. (1917) I. L. R. 41 M. 435.

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is subject to the result of the suit, if any, brought under O. 21 B, 63.C. P. Code to contest the order. If the suit succeeds the attachment is revived as from the date when it was first effected and any payments made by the debtor to his own creditor after that date, will not affect the rights of the attaching decree-holder. *Bonamali Rai v. Piosunno Narain Choudhury* 1 followed

Second Appeal against the decree of the Court of the Subordinate Judge of South Kanara in Appeal No. 117 of 1919 (A. S. No. 238 of 1919 on the file of the District Court preferred against the decree of the court of the District Munsif of Kundapur in O. S. No. 465 of 1918.

B. Sitarama Rau and K. Srinivasa Rau for the appellants.

K. Y. Adiga for the respondent.

The court delivered the following

Judgment :—The question for our decision in this Second Appeal is whether the payment of the two instalments of the plaint bond made by the defendants to Rukmini Shettithi and Mahabala Hegde on 18th March 1914 and 17th February 1915 respectively, are valid against the plaintiff. The learned Subordinate Judge has found them to be not valid and has disallowed the plea of partial discharge based on them.

The bond sued on is a simple money bond payable by instalments and was executed by the defendants in the name of one Sinnappa Chetty. Now it has been found that Sinnappa Chetty was merely a name lender or benamidar for one Nagappa Hegde to whom the debt was really due. One Sankayya got a decree against Nagappa in O. S. No. 496 of 1909 and attached the plaint debt in execution of his decree in 1913. Before that the bond had been assigned by Sinnappa to Rukmini and Mahabala who are the persons to whom the payments in question here were made by the defendants and who are the children of Nagappa. On the attachment being effected they preferred a claim under Order 21 Rule 58 of the Civil Procedure Code to the whole debt. Their claim was allowed and the attachment was withdrawn on 17th February 1914. Sankayya the defeated decree-holder creditor then brought a suit against Nagappa his judgment-debtor and against Sinnappa Chetty and his assignees, Rukmini and Mahabala, and against the present defendants, the debtors, under the bond for a declaration that Sinnappa was a benamidar for Nagappa and so were his assignees and that he was entitled to attach the debt in execution of the decree. This suit was filed in April 1914. The

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suit was decreed in Sankayya's favour and the appeal and Second Appeal against him failed and the debt due under the bond was sold in court auction in 1911; whether there was a fresh attachment or not, does not appear. The plaintiff purchased the debt in that auction and now sues for the whole amount due as it stood on the date of the original attachment.

It will be observed that the payments pleaded by the defendants were made, the first one just after the original attachment was raised and before Sankayya's declaratory suit was filed, and the second when that suit was pending; both were made after the instalments fell due under the bond but after the date of the original attachment. *Prima facie* plaintiff is not entitled to recover more than what was due under the bond on the date of his purchase. But it is urged that these two payments do not amount to a valid discharge against him on two grounds.

It is first urged that the payments were made to two persons who had no right whatever to the money and so they could not amount to a valid discharge against Nagappa, whose right plaintiff purchased, nor against the plaintiff. No doubt it has been found in Sankayya's declaratory suit that Rukmini and Mahabala had no rights in the suit bond but that evidently means that they had no beneficial interest in it, for Sankayya's own case was that they took the assignment as benamidar for Nagappa and that in fact the assignment ~~was~~ made merely to change the benamidars. By the assignment Sinnappa transferred the bond debt to Nagappa's wife and child for Nagappa, apparently at his own instance. The argument that a benamidar is a trustee and cannot transfer his trust to a third party does not apply to the facts here, and is untenable. Taking Rukmini and Mahabala as benamidars for Nagappa, a payment to them will be good against him unless it was made after notice and objection by him. It has been laid down that a benamidar is entitled to sue in his own name both as regards simple bonds and as regards mortgage debts (*See Singa Pillai v. Govinda Reddy* ¹) and the cases cited therein, and that the real owner need not be made a party. That being so, it follows that a payment made to the benamidar in discharge of the bond will bind the real owner if made without notice and objection by him. The learned Subordinate Judge says the payments in this case were not made bona fide because the defendants

1, (1917) I. L. R. 41 Mad. 435.

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knew the benami character of the assignment to Rukmini and Mahabala but that fact will not interfere with the payment being good against Nagappa. Their knowledge by itself has no bearing on the validity of their payments as against him. There is no evidence that Nagappa required the defendants not to pay to them nor has he objected to such payments. It is more likely that the payments were made with his knowledge and connivance. The first objection therefore fails and must be overruled.

The next objection is that the payments were made after the debt had been already attached and were therefore void against all claims enforceable under the attachment under S. 64 of the Civil Procedure Code and as plaintiff's purchase was one in execution they are not valid against him. It is true that the payments were made only after the original attachment was raised by the order of court when the claim of the assignees was allowed; but it is argued for the plaintiff that when Sankayya brought his suit under Order 21 Rule 63 of the Civil Procedure Code and got a declaration that the debt was attachable in execution of his decree and that his first attachment was a valid one, the original attachment was revived and any payment made after it to the judgment-debtor is invalidated by S. 64 of the Civil Procedure Code; a payment to the judgment-debtor's benamidar being a payment for the former's benefit will no doubt stand on the same footing. In support of the contention that the attachment should be taken as revived and continuing in force all the time, reliance is placed on *Ali Ahmad Khan v. Bansidhar*¹ *Bonomali Rai v. Prosunno Narain Chowdhury*² *Ram Chandra Marwari v. Mudeshwar Singh*³ and *Lalu Mulji Thakur v. Kashibai*⁴. These authorities do lay down that the release from attachment on the claim being allowed is only provisional in character and is subject to the result of the suit which is allowed to be brought by the Code to contest the order and if the suit succeeds the attachment is revived from the beginning. As observed in *Bonomali Rai v. Prosunno Narain Chowdhury*², to hold otherwise would in very many cases defeat the object of the suit and render the decree infructuous; See page 834. We respectfully accept this view and are

1. (1909) I. L. R. 31 Ali. 367

2. (1896) I. L. R. 23 Cal. 829.

3. (1906) I. L. R. 33 Cal. 1158.

4. (1886) I. L. R. 10 Bom. 400, 407.

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prepared to follow it. It is suggested that the principle should not be applied against persons like these defendants who were not parties to the claim and the case in *Patringa Koer v. Madhavan and Ram*¹ is cited as supporting this contention. That was a case where owing to the decree-holder's default, the attachment was removed and it had nothing to do with any claim proceedings; thus it has no direct bearing on the present case. It is not therefore necessary to consider whether we should follow it or not.

We also think the fact that the defendants were not made parties to the claim makes no difference in this case. They were parties to the subsequent suit and, as we are inclined to think the effect of the decree in that suit was to restore the attachment which had been provisionally removed, it must be taken to have been restored as against all parties affected by it or at any rate against all persons who were parties to the suit. It was also argued that there was a difference between debts and other properties on this point because the mode of attachment of debts prescribed by O. 21 R. 46 restricts the effect of the prohibition till the further orders of the court are passed, whereas in the case of immoveables or other properties there is no such limitation. This difference is merely due to the nature of the property attached and it makes no difference in our opinion as to the effect of the attachment. When the attachment is taken as revived by the decree in the subsequent suit we must take it that the order of release which is as much a provisional order in the case of debts as in other cases is cancelled and any payment made under that order of release becomes void as S. 64 comes into play. We must therefore allow plaintiff's second objection and hold that the two payments made in this case are not valid against him on that ground.

The decree of the Subordinate Judge is therefore right. The Second Appeal fails and is dismissed with costs.

A. V. V.

Second Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR WILLIAM AYLING, OFFICIATING CHIEF JUSTICE AND MR. JUSTICE KRISHNASWAMI RAO.

Mahajanam Venkatrayar ... *Petitioner* * (*Complainant*.)

v.

Kodi Venkatrayar and others ... *Respondents* (*Accused*.)

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Criminal Procedure Code, S. 250—Evidence, showing commission of offence triable by Sessions court—Magistrate trying the case as constituting lesser offence triable by him—Acquittal—Order for payment of compensation.

The evidence adduced in a criminal case before a Magistrate disclosed the commission of an offence triable only by the Sessions Court. But the Magistrate being of opinion that on the facts, if at all, only a lesser offence triable by him had been committed, tried the case, acquitted the accused and made an order for the payment of compensation to him under S. 250 of the Cr. P. Code. Held that neither the trial nor the order for payment of compensation was illegal.

Emperor v. Ayyan and Vellayappa Udayan 1 applied.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, and S. 107 of the Government of India Act praying the High Court to revise the order, dated 31—8—1920, of the Court of Session, North Arcot Division, in Criminal Revision Petition No. 18 of 1920 presented against the order, dated 3—3—1920, of the Court of the Sub Divisional 1st class Magistrate of Thiruvannamalai in C. C. No. 12 of 1920.

S. E. Sankara Aiyar for V. V. Devanatha Aiyangar for Petitioner.

T. Narayana Aiyangar for T. L. Venkatarama Aiyar for Respondents.

The Court made the following

Order :—In this case a compensation order under S. 250 of the Code of Criminal Procedure is attacked as illegal.

It is argued that the facts appearing in evidence constitute an offence under S. 467 of the Indian Penal Code, which is triable only by a Sessions Court, and that, in consequence the Magistrate had no jurisdiction to act under S. 250 of the Code of Criminal Procedure. In our opinion the offence disclosed was one under S. 467 : but the Magistrate undoubtedly regarded it as one under S. 465 of the Indian Penal Code (which he had jurisdiction to try) and specifically refers to the latter section in his order. Does the former fact affect the legality of his order of compensation ? We think not. The Magistrate

*Cr. R. C. 775 of 1920 (Cr. R. P 648 of 1920)

26th July, 1921.

1. (1901) I. L. R. 24 M. 676,

undoubtedly proceeded under Chapter 21 of the Code of Criminal Procedure and not under Chapter 18; and *King Emperor v. Ayyan and Vellayappa Udayan* ¹ is clear authority for holding that if the case had ended in a conviction, that conviction would not be illegal merely because the offence committed really fell under a more serious section and was not one which the Magistrate was competent to try. Applying the line of reasoning adopted in that judgment to the present case, we think it must be held that as the Magistrate was not proceeding illegally in trying the accused for the lesser offence, he was not acting illegally in awarding compensation when he found the accusation to be frivolous or vexatious. Two cases have been cited for petitioner. Of these, *Emperor v. Chhabha Dolson* ² is easily distinguishable, for in that case, the Magistrate was certainly acting under Chapter 18 and passed his order of discharge under S. 209. The other, *Het Ram v. Ganga Sahai and others* ³ is the decision of a single Judge and the judgment leaves it doubtful which offence the Magistrate conceived himself to be enquiring into. We do not think there are any grounds for interference and we dismiss this petition.

Venkatrayar

T.
Venkatrayar

A V. V.

Petition Dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE SPENCER.

Pingali Venkataramana Reddi by

his authorised agent Brah-
manda Narasimha Rau ...*Appellant* * (25th Defendant).

v.

Kotigari M. Rangiah Chetti
and others ...*Respondents (Plaintiffs Nos. 1
and 2 and defendants Nos. 1,
18, 19, 20, 22, 23 and 24.)*

Transfer of Property Act, Ss 48, 52 and 101—Lis pendens—Execution of mortgage-deed before institution of suit—Registration pendente-lite—Effect of—Mortgage—Prior and subsequent—Suit on prior mortgage without impleading puisne mortgagee—Decree—Rights of purchaser of a portion of the mortgaged property in extinction sale—Partial payment of the decree on the prior mortgage—Subrogation—Rights of mortgagee from purchaser.

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3rd May, 1921.

1. (1900) I. L. R. 24 Mad 675.

2. 19 Bom. L. R. 60.

3. (1918) I. L. R. 40 All. 615.

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A second mortgage executed before but registered after, the institution of a suit on the first mortgage, is not affected by the doctrine of *lis pendens*. The second mortgage though registered during the pendency of the suit on the first mortgage takes effect from the date of its execution. If the first mortgagee obtains a decree and sells the mortgaged property in execution without impleading the second mortgagee as a party to the suit, the rights of the latter under his mortgage are not affected.

Tilakdhari Singh v. Gour Narain (1) not followed.

Veerakutti Gowndan v. Ramaswami Asari (2) followed.

Mulla Veetil Seethu v. Achuthan Nair (3) relied on.

A prior mortgagee sued on his mortgage and obtained a decree for sale without being aware of, and therefore without impleading the puisne mortgagee as a party to the suit. In execution of the decree an item of the mortgaged property was sold and with the purchase money, a portion of the decree amount was paid off. The purchaser at the execution sale in his turn mortgaged that item to the defendant to secure moneys already borrowed by him for the purpose of depositing the purchase money at the Court sale. The defendant obtained a decree on his own mortgage, executed it and purchased the rights of his own mortgagor in the item mortgaged to him. Subsequently in a suit by the puisne mortgagee to enforce his mortgage, the defendant pleaded that he was entitled to a prior charge on the item sold in execution of the decree on the first mortgage, to the extent to which that decree was satisfied.

Held, (1) that the purchaser at the execution sale having released the item purchased by him from all liability under the decree on the prior mortgage was entitled to a prior charge on that item in respect of the moneys paid by him towards the decree on the prior mortgage;

(2) that notwithstanding the fact that the prior mortgagee had a decree on his mortgage and sold the property in execution thereof, it was open to the purchaser to hold his right to the prior charge as a shield against the puisne mortgagee in the suit by the latter to enforce his mortgage;

Muthammal v. Rasu Pillai (4) *Chagan Lal v. Muhammad Hussain Khan* (5) *Matru Lal v. Durga Kunwar* (6) Relied on

Hel Ram v. Shadi Ram (7) distinguished

(3) that the right of the defendant to hold the prior charge as a shield was not affected by limitation;

(4) that the purchaser had not a general right of subrogation by reason of the fact that he had paid off a portion of the decree on the prior mortgage;

Hanumanthayan v. Meenatchi Naidu (8) *Bisnath Karunan v. Devi Dass* (9) followed. *Saminatha Pillai v. Krishna Iyer* (10) *Udith Narain Misir v. Asharfi Lal* (11) referred to;

but (5) that the defendant being a mortgagee from the purchaser was entitled to avail himself of all the rights which his own mortgagor had in that particular item of the mortgaged property which was freed from all liability by the purchaser including the right of priority as aforesaid.

1. (1920) 5 Pat. L. J. 715.

2. (1915) 32 L. C. 431.

3. (191) 21 M. L. J. 213.

4. (1917) I. L. R. 41 Mad. 513.

5. (1919) I. L. R. 41 All. 455.

6. (1920) I. L. R. 42 All. 364.

7. (1918) I. L. R. 40 All. 407.

8. (1911) I. L. R. 35 Mad. 183.

9. (1915) 29 I. C. 511.

10. (1915) I. L. R. 98 Mad. 548.

11. (1916) I. L. R. 38 All. 542.

Appeal against the decree of the Court of the Subordinate Judge of North Arcot in Original Suit No. 122 of 1916.

Fact :—The facts of the case appear in the judgment of Spencer, J.

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N. Sivaramakrishna Iyer for *T. M. Krishnaswami Iyer* for appellants. Since plaintiff's mortgage was registered pending the suit O. S. No. 6 of 1890 the auction purchaser in that suit and his representative, the appellant, get a title free from the mortgage. No title passes until registration. Under S. 49 of the Registration Act the mortgage cannot affect immoveable property unless it is registered. It is registration that finally effects the transfer. *Papireddi v. Narasareddi* ¹, *Sheo Narain Singh v. Darbari Mahton* ², *Kurri Veerareddi v. Kurri Bapireddi* ³, *Ramanathan v. Ranganathan* ⁴, *Sethuramaswami Nayanam Varu v. Syed Mir Hussain Saheb* ⁵, *Tilakdhari Singh v. Gour Narain* ⁶ is exactly in point. S. 47 of the Registration Act which gives effect to title as from the date of execution cannot override superior rights which have accrued in the meantime. It cannot prevail over *lis pendens*. Reference was made to *Gulabchand Manickchand v. Dhondi* ⁷ and *Kalyanasundaram Pillai v. Krishnasami Iyer* ⁸.

Under S. 85 of the T. P. Act, which was then in force, the suit of 1890 was properly constituted as to parties. The plaintiff had only an unregistered mortgage at the date of that suit and had therefore no interest in the property on that date. Consequently the purchaser in execution of the decree in that suit gets a title free of plaintiff's mortgage.

In any event, the auction purchaser in execution of the mortgage decree in O. S. No. 6 of 1890 is entitled to be subrogated to the rights of the decree holder to the extent of the price paid by him. *Vanamakalinga Mudali v. Chidambara Chetty* ⁹; *Mahalakshmiammal v. Madhwa Siddhanta Onnāhini Nidhi* ¹⁰; *Chinnu Pillai v. Venkatasami Chettiar* ¹¹; *Multhammal v. Razu Pillai* ¹² and *Mulla Veetil Seethi v. Achuthan Nair* ¹³.

1. (1892) I L. R. 16 M. 464, 466.

3. (1906) I L. R. 29 M. 336.

5. (1918) I L. R. 42 M. 503, 505.

7. (1873) 11 B. H. C. R. 64, 66.

9. (1905) I L. R. 29 M. 37.

11. (1915) I L. R. 40 M. 77.

2. (1897) 2 C. W. N. 207.

4. (1917) I L. R. 40 M. 1134.

6. (1920) 5 Pat. L. J. 715.

8. (1920) 13 L. W. 187.

10. (1911) I L. R. 35 M. 642, 647.

12. (1917) I L. R. 41 M. 513.

13. (1911) 21 M. L. J. 213.

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The effect of the order absolute is only to put an end to the rights under the mortgage deed. There cannot be a fresh suit on the mortgage as such. This is all that was decided in *Hetram v. Shadi Ram* ¹. In that case the decree absolute was allowed to become barred and it cannot be applied to a case where the decree has been executed and a court sale has taken place. Reference was made to *Shadi Ram v. Het Ram* ², *Parsotam Das v. Patesri Partab Narain Singh* ³ and *Bibijan Bibi v. Sachi Bewah* ⁴. The long course of decisions including those of the Privy Council recognising the right of subrogation under the circumstances of this case could not be deemed to have been overruled by *Hetram v. Shadi Ram* ¹. Reference was made to, *Narayana Kutli Goundan v. Pechiammal* ⁵; *Mali-reddi Ayyareddi v. Gopalakrishnayya* ⁶; *Slyam Lal v. Bashir-ud-din* ⁷ *Rahim-un-nissa v. Badri. Das* ⁸ and *Digambar Das v. Harendra Narain Panday* ⁹.

Even the Privy Council have consistently recognised the right. *Gokaldas v. Puranmal* ¹⁰, *Lutif Ali Khan v. Fulleh Bahadur* ¹¹ *Umesh Chunder Sircar v. Zahur Fatima* ¹², *Dinombundhu Shah Chowdhury v. Jogmaya Dasi* ¹³ and *Matru Lal v. Durga Kunwar* ¹⁴. The result of the cases is that the court auction purchaser in a defective mortgage suit is in the position of an assignee of the rights of the mortgagee and of all persons who were actually parties thereto. Reference was made to *Chinnu Pillai v. Venkatasami Chettiar* ¹⁵, *Muthammal v. Razu Pillai* ¹⁶, *Mulla Veetil Seethi v. Achutan Nair* ¹⁷ and *Magan Lal v. Shakra Girdhar* ¹⁸. There is no total extinction of the security.

The right of subrogation subsists though only a portion of the mortgage decree has been paid off. *Saminatha Pillai v. Krishna Iyer* ¹⁹ and *Bismath Karumani v. Devi Doss* ²⁰ and *Abdit Narain Misir v. Asharfi* ²¹. The decisions in *Hanuman-*

1. (1918) I. L. R. 40 A. 407 P. C.

2. (1918) 11 A. L. J. 634.

3. (1913) I. L. R. 35 A. 250, 253.

4. (1904) I. L. R. 31 C. 863.

5. (1911) I. L. R. 36 M. 426.

6. (1220) 12 L. W. 101.

7. (1906) I. L. R. 28 A. 778.

8. (1911) I. L. R. 33 A. 368.

9. (1910) 11 C. L. J. 226.

10. (1884) I. L. R. 10 C. 10 35.

11. (1889) I. L. R. 17 Cal. 23.

12. (1890) I. L. R. 18 C. 164.

13. (1901) I. L. R. 29 C. 154.

14. (1920) I. L. R. 42 A. 364.

15. (1915) I. L. R. 40 M. 77, 82.

16. (1917) I. L. R. 41 M. 513, 515.

17. (1911) 21 M. L. J. 213 225.

18. (1897) I. L. R. 22 B. 945, 948.

19. (1915) I. L. R. 38 M. 548.

20. (1915) 29 I. C. 511.

21. (1914) I. L. R. 38 All. 502.

thaiyyan v. Meenakshi Naidu ¹ and *Gurdeo Singh v. Chandrika Singh* ² proceed on the theory of inconvenience. The rule has no application to court sales. There is no difficulty in working out the rights of several persons in a given case. The reason fails where a mortgagee himself splits up the mortgage security as he is entitled to do.

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The claim for subrogation extends to the full purchase money. *Lutf Ali Khan v. Futtell Bahadur* ³ and *Muthammal v. Razu Pillai* ⁴. The mortgagee from the auction purchaser is equally entitled to claim priority. The fund in court really represents the mortgaged property. *Barhamdeo Prasad v. Tara-chand* ⁵.

N. Chandrasekhara Iyer for respondent. The rule of *lis pendens* is inapplicable to this case. Registration is not an act of transfer within S. 52 of the T. P. Act. The Act of transfer is complete on execution and registration gives validity as from the date of execution. S. 47 of the Registration Act. *Bapuji v. Icharan* ⁶ and *Veerankutty Koundan v. Ramasami Asari* ⁷. Dr. Ghose's notes to S. 52 of the T. P. Act; Bennet on *Lis Pendens*; *Tanka Gopalan v. Tanka Rattainma* ⁸. The cases relied on in *Tilakdhari Singh v. Gournarain* ⁹ are all cases of oral sales. The purchaser at the execution sale cannot defeat the rights of the puisne mortgagee on the ground of *lis pendens*.

The effect of the order absolute in O. S. No. 6 of 1890 is to extinguish the mortgage. It cannot therefore be put forward again either as a lien, whether by right of subrogation or otherwise. Reference was made to *Hetram v. Shadiram* ¹⁰, *Chagan Lal v. Md. Husain Khan* ¹¹, *Kalidas Chowdhury v. Prasanna Kumar* ¹² and *Lakshmanan Chetty v. Muthiah Chetty* ¹³. In *Matrumal v. Durga Kunwar* ¹⁴ the point was conceded and not even argued. *Mirza Yadalli Beg v. Tukaram* ¹⁵ was a case of foreclosure and not of sale.

1. (1911) I. L. R. 35 M. 183.

3. (1889) I. L. R. 17 C. 23.

5. I. L. R. 41 Cal. 654 (P. C.)

7. (1918) 32 I. C. 431.

9. (1920) 5 Pat. L. J. 715.

11. (1919) I. L. R. 41 All. 456.

13. (1919) 40 M. L. J. 126.

2. (1908) I. L. R. 86 C. 193.

4. I. L. R. 41 M. 513, 515.

6. (1887) B. P. J. 311.

8. (1914) 28 M. L. J. 666.

10. (1918) I. L. R. 40 All. 407.

12. (1919) I. L. R. 47 Cal. 446.

14. (1920) I. L. R. 42 All. 364.

15. (1920) 39 M. L. J. 147.

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The mortgage decree not having been satisfied fully, there is no right of subrogation. A partial payment does not give rise to a right of subrogation. *Seetharama v. Venkata krishna* ¹; *Gurdeo Singh v. Chandrika Singh* ², *Hanumanthayyan v. Meenakshi Naidu* ³, *Saminatha Pillai v. Krishna Aiyer* ⁴, *Bismalh Karuman v. Devi Doss* ⁵ and *Dulhin Sona Koor v. Jamil Ahmed* ⁶

The 25th defendant had no right of subrogation. He had no right of his own to protect. He lent moneys which were utilised by the purchaser in paying off the purchase money at the court sale. The defendant is a mere volunteer. Reference was made to *Veeraraghava Iyer v. Lakshmana Iyer* ⁷ and *Karuppan Ambalagaran v. Md. Sokut Leval* ⁸ *Yogamba Bai Ammani v. Naina Pillai Marcayer* ⁹ *Narayana Kutti Goundan v. Pechemmal* ¹⁰ and *Govinda Padayachi v. Lokanatha Iyer* ¹¹.

Lastly even if there was a right in favour of the 25th defendant, it became barred. A claim to subrogation is a claim to enforce a charge and this right accrued in 1893. It is barred under Art. 132 of the Limitation Act. *Mahomed Ibrahim Hoosain Khan v. Ambika Persad Singh* ¹² and *Hetram v. Shadi Ram* ¹³

N. Sivaramakrishna Iyer replied.

The Court delivered the following

Sadasiva
Aiyar, J.

Judgments :—*Sadasiva Aiyar, J.* :—The facts are set out in the opinion of my learned brother and I shall not repeat them. I entirely agree with my learned brother on the question of *lis pendens* and that we should follow the decision of our own court in *Veerankutty Koundan v. Ramasami Asari* ¹⁴ in preference to the decision in *Tilakdhari Singh v. Gournarain* ¹⁵.

The question which remains for consideration is whether the 25th defendant, the appellant, is entitled to stand in the shoes of the decree-holder in O. S. No. 6 of 1890 (whom I shall call the prior mortgagee) so that he (the appellant) can

1. (1892) I. L. R. 16 M. 94.

3. (1911) I. L. R. 35 M. 188.

5. (1915) 29 I. C. 511.

7. (1912) 25 M. L. J. 312;

9. (1909) I. L. R. 33 M. 15 ;

11. (1919) 40 M. L. J. 114.

13. (1918) I. L. R. 40 A 407 (P.C.)

2. (1908) I. L. R. 36 C. 193.

4. (1915) I. L. R. 88 M. 548.

6. (1918) 48 I. C. 779.

8. (1913) 26 M. L. J. 74

10. (1911) I. L. R. 36 M. 426 ;

12. I. L. R. 39 Cal 527, 557 (P. C.)

14. (1915) 32 I. C. 481

15. (1920) 5 P. L. J. 715.

set up those rights as a shield against the plaintiff's claim to proceed against the sum of Rs. 3,000 which now represents item 2 of the mortgaged properties, the said item 2 having been mortgaged both in that prior mortgage and in the plaintiff's subsequent mortgage sued on.

So far as the ownership right in item 2 (the Karvetnagar forest) now represented by the Rs. 3000 is concerned, I think that as the suit O. S. No. 6 of 1890 was properly constituted without notice of the plaintiff's subsequent mortgage, Revanur Subramaniya Aiyar obtained by his purchase in execution of his decree in the said suit complete title to the ownership of that property. The plaintiff, the subsequent mortgagee, not having been a party to the suit of 1890 is, however legally entitled to bring the present suit for sale on his mortgage notwithstanding that the property had been sold away in the former suit and even though his having been not impleaded in the former suit was not due to any fault on the part of the prior mortgagee.

The further questions which arise for consideration on the pleadings are (1) whether the court auction purchaser Revanur Subramaniya Aiyar, if he had continued to be in possession of the forest as such purchaser and if he had been made a party to the plaintiff's present suit as being in such possession of item 2 of the mortgaged properties could have claimed to elect to stand in the shoes of the prior mortgagee and to hold up either that prior mortgage or the rights declared by the decree passed on the footing of that mortgage, against the plaintiff, so as to compel the plaintiff to pay up the purchase-money so far as it went to discharge the prior mortgage decree before bringing item 2 to sale if item 2 had remained available for sale : (2) whether he would not have been legally entitled to set up that right because the purchase-money paid for his purchase of item 2 in the court auction sale did not fully satisfy the decree in O. S. No. 6 of 1890 : (3) whether even if Revanur Subramania Aiyar might have had that right, the 25th defendant who represents the interests of Subbiah Chetti, a mortgagee under Revanur Subramania Aiyar cannot claim to enforce the rights of Subramania Aiyar against the Rs. 3000 in dispute in order to satisfy the charge of Rs. 7000 and interest due under Subbiah Chetty's mortgage (and which has ripened into a decree for Rs. 18,000 and odd in 1915 passed in a suit to which all persons

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then interested were made parties): (4) whether the 25th defendant is not entitled to set up Revanur Subramania Aiyar's rights as a shield because the prior mortgagee would be barred if he brought a suit on his prior mortgage of 1886 on the date of the present suit in 1916: (5) whether Revanur Subramania Aiyar was merely a benamidar for the original mortgagor (the Rajah) and hence he would not have had the right to set up the rights of the prior mortgage decree holder as a shield against the plaintiffs subsequent mortgage and hence also the 25th defendant has no such right: and (6) whether the fact that the prior mortgagee's rights as mortgagee were merged in the decree passed thereon extinguished the mortgage security and hence, it could not be revived to serve as a shield against the plaintiff in favour of Revanur Subramania Iyer and of persons claiming in his right and whether no other right exists which could be availed of by the 25th defendant as an effectual shield against the plaintiff's claim to proceed against the 3000 Rs.

As usual in these cases involving conflicts between the rights of prior and subsequent mortgagees and between persons claiming to represent them partially or wholly and especially where the transactions have been numerous and several years old, the complexity and abstract nature of the legal rights and ideas involved make it difficult to hold clearly in the mind and arrive at a correct conclusion and the difficulty of expressing in clear and accurate language with all the necessary qualifications the reasons for arriving at a conclusion even after arriving at what one feels to be a correct conclusion, is also not inconsiderable. This appeal, I may state has been argued with conspicuous ability and acumen by Mr. Sivaramakrishna Aiyar (who appeared for the appellant's vakil) on one side and Mr. Chandrasekara Aiyar on the other side, and they naturally took full advantage of the general and broad expressions in favour of their respective contentions, found in the numerous cases quoted by them on the legal questions involved. Even learned Judges (if I may say so with respect) have been naturally unable to lay down the rules of law governing these questions in judgments pronounced by them in particular cases with all the necessary qualifications and limitations which would have to be applied to those rules if additional facts and circumstances of a special nature besides those appearing in the particular cases in which

the decisions were given were involved therein. For instance in *Multhammal v. Rasu Pillai* ¹ that very learned Judge Srinivasa Aiyangar, J. has formulated (with his usual lucidity, if I may respectfully say so) certain broad propositions relating to the law of mortgages at pages 515 to 517, as resting on principle, apart from authorities. He says : "A mortgagee who sues for the sale of the secured properties, if he succeeds, gets the title of the mortgagor as it stood on the date of his mortgage or transfers that title to the purchaser free from all interests or liens subsequently created by the mortgagor, provided he makes the owner of such interests or liens parties to the suit, but if he omits to make any of them parties, their rights or liabilities are not affected but the purchaser" (that is, the court auction purchaser) "would acquire the rights in the mortgaged properties of all the persons who were parties, just as if he had obtained an assignment from all of them without however a merger of the interest or extinction of the lien so acquired. It is immaterial whether the purchaser is the mortgagee who sued, or another person, except that the latter would be subrogated to the rights of the mortgagee only to the extent to which the debt was paid out of the price." Then the learned Judge qualifies these broad statements by half a dozen sentences in which it is shown how some particular facts would affect this broad rule. It was of course unnecessary for the learned Judge, unless he was prepared to write an exhaustive treatise on that section of the law of mortgages, to refer to all possible special facts and circumstances and how each set of such facts would affect the rule so laid down broadly. For instance, he had not to consider whether and how the rule would be affected if the purchaser purchased one only of the several properties advertised for sale and if the purchase money did not satisfy the whole of the mortgage decree (which is the case we have to consider here.)

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In *Hanumanthaiyan v. Meenakshi Naidu* ² to which my learned brother was a party, it was held by the Bench that a person advancing money privately to the mortgagor for the purpose of discharging the debt due under the first mortgage could not establish his claim to stand in the shoes of the first mortgagee so as to claim priority over the second mortgagee unless the first mortgage was extinguished by his payment, because, otherwise the result would be "a number of persons

1. (1916) I. L. R. 41 Mad. 513 2. (1914) I. L. R. 35 Mad. 183.

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would be entitled to rank as first incumbrancers with reference to different sums of money advanced by them and it would be impossible to work out the rights of the parties" and the Bench declined to follow *Seetharama v. Venkatakrishna* ¹. The learned Judges had not to consider the question whether if by the partial payment, one of the mortgaged properties became wholly absolved from liability to the first mortgagee, the person who made such payment could claim priority over the second mortgagee *so far as the charges fell over that particular property* so released from the first mortgage (the release usually takes place by or with the consent of the first mortgagee) nor did the learned Judges (because they were not called upon to) consider the question whether a court auction-purchaser stood on a higher footing than a person who purchased one of the mortgaged properties outside the Court. A court auction sale of one of the mortgaged properties which satisfies a portion of the decree amount prevents that particular property from being brought to sale again for the balance and the inconvenience mentioned in *Hanumanthaiyan v. Meenakshi Naidu* ² namely, the contingency of a number of persons claiming to be entitled to rank as first incumbrancers would not arise in such a case. I also think (with great respect) that the inconvenience may not in practice be so very great after all. If several persons pay separate sums which discharge (taken together) the first mortgagee, they can get charges respectively in proportion to the amounts paid by them all in priority to the second mortgagee, out of the sale proceeds of the mortgaged properties when they are sold outright.

Then in *Bismath Karumani v. Devi Doss* ³ decided by Napier, J. and myself, we held following *Hanumanthaiyan v. Meenakshi Naidu* ² (which had not then been reported in the authorized series but to which we referred in our judgment from the unauthorised reports) that a person who advances money to partially discharge a prior mortgage cannot claim subrogation *where the prior mortgagee had not released his mortgage rights over the property so purchased*. That judgment seems to imply that even though the prior mortgage had only been partially discharged by the purchase-money of one of the mortgaged properties sold, *if the mortgagee had released his*

1. (1891) I. L. R. 16 Mad. 94.

2. (1911) I. L. R. 37 Mad. 183.

3. (1911) 29 I. C. 511.

claim over that one property for the balance of the mortgage amount still due to him, the court might be justified in recognizing in the purchaser of that property the right to a prior charge over the second mortgagee to the extent of the purchase money so far as that particular property so released was concerned and it was immaterial whether the sale was a private sale or a court auction sale.

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The principle of the Privy Council decision in *Gokuldas Gopaldas v. Puranmal Premeukhadass*¹ (the well known case of Gokul Doss) should, in my opinion, be construed and applied as liberally as possible and it was so construed and applied by their Lordships in *Dinobhandhu Shaw Chowdhry v. Jogaya Dasi*². The general rule that where the prior mortgagee is not fully discharged by a payment made by a person interested, the latter cannot claim subrogation has therefore been subjected to various exceptions and, in my opinion, that rule should be strictly confined to cases which could not possibly be covered by any one of the numerous exceptions engrafted on the rule.

I shall now consider some of the numerous cases quoted before us. I need not say that if the observations in them are taken broadly, it is difficult to reconcile all the cases. In *Gurdeo Singh v. Chandrikah Singh* and *Chandrikah Singh v. Rash Behary*³. Mr. Justice Mookerjee considers this point at page 221 and he says: "The rule therefore that before one creditor can be subrogated to the rights of another, the demand of the latter must be entirely satisfied, so that he shall be relieved from all further trouble, risk and expense, is based upon good sense and ought to be adopted as applicable to the case before us." And then he quotes an old American authority of 1807 which was concerned with the rights of a surety who paid only a portion of the debt due to the creditor. He does not consider the question whether if the prior mortgagee creditor first released his rights over one of several properties mortgaged in consideration of the payment of a portion of the debt by an interested third person, that person can claim subrogation to the extent of the money paid in respect of the charge on that property. In *Saminatha Pillai v. Krishna Aiyar*⁴ Sankaran Nair and Oldfield, JJ. relied

1. (1885) I. L. R. 10 Cal. 1035.

2. (1901) I. L. R. 29 Cal. 154.

3. (1908) I. L. R. 36 Cal. 193.

4. (1913) I. L. R. 38 Mad. 548.

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upon *Rupabhai v. Audimulam* ¹ in support of their decision that even the person who partially discharges the prior encumbrance is entitled to claim priority to that extent and as a reason for the learned Judges not following *Hanumanthayan v. Meenakshi Naidu* ² and *Gurdeo Singh v. Chandrikah Singh and Chandrikah Singh v. Rash Behary Singh* ³ Mr. Chandrasekara Aiyar argued acutely that the learned Judges had misunderstood the facts in *Rupabhai v. Audimulam* ¹ and that those facts clearly showed that the prior mortgage debt as a mortgage debt was fully discharged by the person whose money went towards satisfying it, the mortgagee having accepted a new undertaking not involving a charge on the mortgaged properties in satisfaction of his claim for the balance of his mortgage debt. (See the facts stated at page 352 in *Rupabhai v. Audimulam* ¹). It must be admitted that there is some force in Mr. Chandrasekara Aiyar's criticism of the judgment in *Saminatha Pillai v. Krishna Aiyar* ⁴. Then we come to *Abdit Narain Misir v. Asharfi* ⁵ which decided that a purchaser of the equity of redemption is entitled to stand in the shoes of a prior incumbrancer "where the purchaser has with the consent of the incumbrancer partially discharged the liability." The learned Chief Justice and Mr. Justice Muhammad Rafiq dissent from the broad observations in *Gurdeo Singh v. Chandrikah Singh and Chandrikah Singh v. Rash Behary Singh* ³, follow *Chetwynd v. Allen* ⁶ and *Baroness Wenlock v. River Deo Company* ⁷ and say that unless a further liability was thrown on the puisne incumbrancer or on the property by the fact that the payment was only partial, subrogation ought to be allowed even in favour of the person who makes a partial payment to the extent of the amount so paid in partial discharge. In *Dulhin Sona Kuer v. Jamil Ahmed* ⁸ the Patna High Court followed *Gurdeo Singh v. Chandrikah Singh and Chandrikah Singh v. Rash Behary Singh* ³. In *Abarthoranam Kutti v. Ittikaparambilathan* ⁹ (decided in October 1919) Seshagiri Aiyar and Moore, JJ. express a doubt whether the decision in *Rupa Rai v. Audimoolam* ¹ is consistent with the decision in *Hanumanthaiyan v. Meenakshi Naidu* ². In the parti-

1. (1887) 1 L. R. 11 Mad. 345.

2. (1911) 1 L. R. 35 Mad. 183.

3. (1903) 1 L. R. 33 Cal. 193.

4. (1913) 1 L. R. 38 Ma 1, 548.

5. 1 L. R. 38 All. 502.

6. (1899) 1 Ch 363.

7. (1887) L. R. 19 Q. B. D. 155.

8. (1918) 48 I. C. 779.

9. (1919) 11 L. W. 215.

cular case in *Abarithoranam Kutti v. Ittikaparambilathan* ¹ the learned Judges allowed priority to the plaintiff to the extent of Rs. 180 as that sum *alone* was applied towards the payment of mortgages earlier than that of the 3rd defendant in that case. In *Mulla Vittil Selu v. Achuthan Nair* ² a Full Bench case, the law as to priorities between mortgagees and the right of a purchaser in court auction in the suit of the first mortgagee in which the puisne mortgagee was not made a party, has been elaborately considered, and it was held among other *dicta* (see page 225), that the prior mortgagee's rights are not merged in the equity of redemption by a private or public sale made to him, as it must always be for his benefit to retain priority for his encumbrance and shield himself against puisne incumbrancers—see S. 101 of the Transfer of Property Act. The rule in *Toulmien v. Steere* ³ has been definitely abandoned in India since (*Gokuldoss' case : Gokuldoss Gopal Doss v. Purannial* ⁴, and largely discountenanced in England.

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In the result, I hold on the first of the six questions which I formulated in the beginning of this judgment that Revanur Subramania Aiyar who obtained possession of item 2 of the mortgaged properties as court auction purchaser in the sale held in execution of the decree on the prior mortgage would, if he were himself party to the present suit, be entitled to priority *to the extent of the purchase money paid by him so far as rights of charge are claimed against item 2 which property became completely released from further obligation under the decree on the prior mortgage.*

I find on the second question that Revanur Subramania Iyer would have been legally entitled to set up that right of prior charge even though the purchase money paid for his purchase of item 2 did not fully satisfy the decree in O. S. No. 6 of 1890.

On the third question, I hold that Revanur Subramania Iyer's rights can be availed of by the 25th defendant who is the assignee of the rights of Revanur Subramania Iyer's mortgagee (Subbiah Chetti), for the purpose of obtaining satisfaction of the mortgage debt and of the decree obtained on that mortgage, as it is an elementary principle of law that the mortgagee creditor can proceed against all his mortgagor's rights over the mortgaged property as they stood on the date of his mortgage (and

• 1. (1919) 11 L. W. 215,

• 2. (1911) 21 M. L. J. 213.

3. (1817) 3 Mer. 230,

4. (1885) 1. L. R. 10 Cal. 1035.

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as against what represents the mortgaged property if it had been sold away lawfully through the existence of a paramount or prior right) so far as it is necessary to obtain satisfaction of his debt.

The 4th question is whether the 25th defendant is not entitled to set up Revanur Subramania Iyer's rights as a shield because the prior mortgagee would be barred if he brought a suit on his prior mortgage of 1886 on the date of the present suit in 1916. Mr. Chandrasekara Aiyar quoted some decisions in support of his contention on this point. He quoted *Mahomed Ibrahim Hossain Khan v. Ambika Pershad Singh*¹ to show that Art. 132 of the Limitation Act enacting the 12 years' period of limitation applied to a suit upon a simple mortgage. Of course it is so. Then he relied on *Sambhu Bin Hanumantha v. Nama Bin Narayan*² in which it was held that the defendants who had a simple mortgage lien on a property and afterwards got an unregistered sale deed which was useless to convey title could rely upon their possession as owners for a further period of twelve years (after the mortgage lien had ceased to exist on the expiry of 12 years from the date of its enforceability) as giving them complete title as owners and that their possession during this further period should not be treated as traceable to their rights as lien-holders. This court has held, following the Privy Council, that even before the first 12 years expired, the defendants could rely on their possession under the unregistered sale deed as the beginning of the term of the 12 years' period for perfecting title by the adverse possession. I am unable to see that a mere *obiter dictum* in the Bombay case which was decided in favour of the defendants on the ground of title by adverse possession having vested in them, is of avail in support of Mr. Chandrasekara Iyer's client who is suing as plaintiff. Then Mr. Chandrasekara Iyer relied on some cases which held that a simple mortgagee cannot as plaintiff bring a second suit for sale after the expiry of 12 years from the due date against a person whom he had not impleaded in his first suit. These cases also are irrelevant as the 25th defendant relies on the prior mortgage not in order to obtain as plaintiff a second decree on the first mortgage for sale but as a shield against the plaintiff's

1. (1909) I. L. R. 39 Cal. 527.

2. I. L. R 35 Bom. 438.

claim, himself standing in the advantageous position of defendant. In fact it will be found in many cases where subrogation to the prior mortgagee's right was allowed in favour of the defendants that a suit on such mortgage would have been barred either on the ground of limitation or on the ground that under S. 89 of the Transfer of Property Act, the security had been superseded by the rights given by the final decree passed in the prior mortgagee's suit. No cases were quoted by Mr. Chandrasekara Aiyar in which the defendant's contention claiming priority was defeated on the ground that the second suit by him on the prior mortgage as plaintiff would be barred. Richards C. J. in *Chagan Lal v. Muhammad Hussain Khan* ¹ points out that at page 466, there is a clear and well understood distinction between a plaintiff's suit to enforce his security and a defendant defending his *position or possession* in a suit brought against him by holding up a security. The cases in *Ellis v. Ellis* ² and *Chhagan Lal v. Muhammad Hussain Khan* ¹ were decided against the plaintiff on the ground that when a security is extinguished, the plaintiff cannot revive it so as to obtain a fresh decree upon it for sale. As Sir Henry Richards, C. J. neatly puts it, "In my previous judgment I have pointed out the distinction between a plaintiff seeking to sell property simply by reason of his having discharged a prior incumbrance and a defendant defending his possession or position in a suit brought against him. The very metaphor of the shield indicates the distinction. A man does not attack with a shield; he defends with it." Here, the 25th defendant is merely seeking to defend his position, namely, the right to proceed against Revanur Subramaniya Aiyar's rights and interests in the forest which had been placed in Subramaniya Aiyar's possession against the plaintiff's attack, by setting up the prior mortgagee's right which was in a manner assigned to Revanur Subramania Aiyar on the principle enunciated by Srinivasa Aiyangar, J. in *Muthammal v. Razu Pillai* ³. I would therefore reject the plaintiff's contention on this 4th question.

The 5th question is whether Revanur Subramania Aiyar was merely a benamidar for the original mortgagor (the Rajah) and hence he would not have had the right to set up the rights

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1. (1919) I. L. R. 41 All 456.

2. (1895) 1 Ch. D. 613.

3. (1917) I. L. R. 41 Mad. 513

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of the prior mortgagee decree-holder as a shield against the plaintiff's subsequent mortgage and hence also; the 25th defendant has no such right. The Subordinate Judge refers to this point in his judgment in a single sentence as follows:—"Whether the Rajah was the real purchaser and Revanur Subramania Aiyar was only a benamidar or whether he is the real purchaser, it is immaterial to consider in this case." As I did not consider it immaterial, the evidence on this point was discussed before us and my conclusion is that it has not been proved that Revanur Subramania Aiyar was the Rajah's benamidar. On the other hand, the release deed Ex. FF. clearly indicates that Revanur Subramania Aiyar was not the Rajah's benamidar. Further, the plaintiff in my opinion is barred by S. 66 (1) C.P.C. (whose language is much clearer and more precise than the language of the corresponding old S. 317) from contending that the court auction purchase by Revanur Subramania Aiyar was made on behalf of the Zamindar, as plaintiff seeks to "maintain" this "suit" "against" the 25th defendant who is a "person claiming title under" the purchase of the certified purchaser Revanur Subramania Aiyar on the ground that the purchase was made on behalf of the Rajah "through whom the plaintiff claims" his mortgage lien sued on.

The 6th and last contention remains to be dealt with and that is whether the fact that the prior mortgagees' rights as mortgagee were merged in the decree passed thereon extinguished the mortgage security and hence, it could not be revived to serve as a shield against the plaintiff in favour of Revanur Subramania Aiyar and of persons claiming in his right and whether no other right exists which could be availed of by the 25th defendant to serve as an effectual shield against plaintiff's claims to proceed against the Rs. 3,000. On this point, I shall briefly refer to a few of the authorities cited in *Heiram v. Shadi Ram*¹ decided in March 1918. Their Lordships of the Privy Council say that S. 89 of the Transfer of Property Act as it extinguished the original security on the passing of a final decree for sale (even though that decree was passed in a suit which was brought only against the mortgagor without impleading the puisne mortgagee), the first mortgagee's rights under his original security ceased to exist and for those rights was substituted the right to a sale conferred by his decree and if that right had not

1. (1918) I. L. R. 40 All. 407

been exercised and if the decree had been allowed by the first mortgagee's negligence to become barred the first mortgagee cannot set up any prior charge as available to him against the second mortgagee. I followed this case *Hetram v. Shadi Ram* ¹ (as I was bound to do) sitting with Mr. Justice Burn in *Lakshmanan Chetty and another v. Muthayya Chetti and others* ². But in this latter case, the first mortgagee tried as plaintiff to obtain a second decree for sale based on his extinguished security which of course cannot be allowed in any case. Mr. Chandrasekara Aiyar relied upon *Hetram v. Shadi Ram* ¹ for his contention that even as a shield, neither the first mortgage nor the right to sell for the decree amount awarded in the suit thereon is available to the 25th defendant. No doubt in *Hetram v. Shadi Ram* ¹ the prior mortgagee was the defendant (and not the plaintiff) and he claimed a prior charge but his defence was defeated on the ground that not only was his right under the first mortgage substituted by his rights as holder of the mortgage decree for sale which he had obtained and by its extinction under S. 89 of the Transfer of Property Act but that even the substituted rights under the decree had been extinguished by the decree not having been executed within the period of limitation and hence he had no rights at all to hold up as a shield. But in the present case the decree on the prior mortgage which decree was substituted for the security was properly executed and possession of the mortgaged property followed the sale in execution and the position of the person in such possession is now occupied by the 25th defendant for purpose of satisfying his (25th defendant's) claim and it is only this position which he holds that is sought to be used as a shield. As I said before, it is impossible in these cases of subrogation to use such precise and comprehensive language in giving reasons for deciding a case depending upon particular facts and circumstances in a particular manner so as to form a sufficient guide for decision of all possible cases where the question of subrogation is involved. If *Hetram v. Shadi Ram* ¹ intended to decide that where the substituted rights under the decree had become again ripened or converted into possessory rights in the mortgaged property in a purchaser in court auction sale held in execution of the decree, such possessory rights and the right to

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1. I. L. R. 40 All. 407

2. (1920) 40 M. L. J. 126.

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utilize such possessory rights cannot also be used as a shield, their Lordships of the Privy Council must have also intended to overrule the numerous cases decided by themselves in which possessory and other rights substituted for the rights under the decree were held sufficient to enable a *defendant* to hold up the prior charge as a shield. The fact that no reference is made to such cases clearly shows that the decision in *Helram v. Shadi Ram* ¹ must be confined to cases where the substituted rights under the decree had also been destroyed without conversion into other rights by the negligence of the prior mortgagee decree holder. In fact that is made conclusive by the later Privy Council decision in *Matru Lal v. Durga Kunwar* ². In this case, there was a prior mortgage, a decree on that prior mortgage in a suit to which the second mortgagee was not made a party, a sale in execution of that prior mortgage decree and a purchase by the first mortgagee decree holder. That decree was in 1884 and possession was given to the prior mortgagee decree-holder purchaser in 1890. The second mortgagee brought his suit long afterwards about 1910 and it was not contended that the first mortgagee could not, because his mortgage had ripened into a decree, set up his security as a shield even though he had executed that decree and got into possession of the mortgaged land as purchaser. It was not that the decision in *Helram v. Shadi Ram* ¹ was ignored, for it was quoted both in the arguments and in the judgment. That decision was relied on only for the proposition that for the mortgagee's original security the right of sale conferred by the mortgage decree was substituted. Their Lordships on the other hand refer to the Privy Council decision in *Umes Chander Sircar v. Zahur Fatima* ³ wherein it was held that the prior mortgagee in possession as court auction purchaser was entitled to be paid the full amount of his prior charge calculated with high interest according to the terms of his mortgage bond itself before the second mortgagee could obtain a decree for sale and then they refer to the case in *Helram v. Shadi Ram* ¹ itself. Then their Lordships point out that *Umesh Chandra Sircar v. Zahur Fatima* ² was decided in respect of the rights of a first mortgagee decree holder purchaser who had obtained his decree before S. 89 of the Transfer of Property Act was enacted and

1. (1918) I L. R. 40 All. 407.

2. (1920) I L. R. 42 All. 364.

3. (1891) I. L. R. 18 Cal. 164.

that it was decided in *Hetram v. Shadi Ram*¹ that S. 89 extinguished the right under the mortgage documents and substituted the rights under the decree passed thereon and the prior mortgagee decree-holder auction purchaser can only claim to hold up as a shield his right to be paid the amount mentioned in the decree passed in the suit brought on the prior mortgage and not the amount due as per the mortgage bond itself. Thus *Hetram v. Shadi Ram*¹ did not extinguish the right to hold up as a shield the claim for the amount mentioned in the decree on the prior mortgage provided that decree had not been negligently allowed to be barred as was the case in *Hetram v. Shadi Ram*¹. On the other hand if the decree rights had further ripened into the rights of a court auction purchaser by execution proceedings though such rights as court auction purchaser could not be availed of against the puisne mortgagee's claim to bring the properties again to sale if the puisne mortgagee had not been made a party to the first suit, such rights could be made the basis of a defence of priority to the extent of the amount of the mortgage decree in the prior suit.

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Whether I have expressed my reasons fully and clearly or not, I am satisfied in my own mind as to the conclusion I ought to arrive at on the facts of this case, namely, that the 25th defendant is entitled to claim priority of resort to Rs. 3000 (representing the Karvetnagar forest and now in deposit in court) in satisfaction of his rights to recover the money due to him to the extent to which it satisfied the decree amount in the suit of the prior mortgagee, over the plaintiff's claim to resort to that same sum for the amount of his puisne mortgage.

In the result, I would allow the appeal and modify the decree of the lower court by substituting in the 4th paragraph of the decree for the words "that the plaintiffs are entitled in priority to receive the amount of Rs. 3000 which is in deposit in the District Court" the words "that the 25th defendant is entitled in priority to the plaintiff to receive the amount of Rs. 3000 which is in deposit in the District Court". Under the circumstances, I will make no order as to costs in this appeal.

1. (1918) I. L. R. 40 All. 407.

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Spencer, J. :—The Rajah of Karvetnagar executed four mortgage deeds between the years 1881 and 1890. The first mortgage of 1881 was in favour of the plaintiffs' father for Rs. 11,000, the items mortgaged being Karvetnagar village and Amur. This mortgage is not concerned in the present suit as it has been satisfied. The second mortgage in 1885 was also in favour of the plaintiff's father for Rs. 25,000, the same two items being mortgaged and the forest of Karvetnagar as well. This also has been satisfied by a sale in 1918 in execution of the decree in O. S. No. 45 of 1898 and an amount of Rs. 3,000 of the sale proceeds remains in court deposit. The third mortgage in 1886 was in favour of Mr. Bowden for Rs. 40,000 and he transferred his rights to the Commercial Bank. The Karvetnagar forest and 9 other villages were mortgaged and a suit, O. S. No. 6 of 1890, to which the Rajah alone was a party, being brought to enforce the mortgage, a decree for Rs. 57,000 was passed. The fourth mortgage is that concerned in the present suit. It was in favour of the plaintiffs for Rs. 11,000, the Karvetnagar forest and other items being mortgaged. In execution of the mortgage decree upon the third mortgage in favour of Mr. Bowden, the Karvetnagar forest alone was sold on the 20th July 1893 and Revanur Subramaniya Iyer purchased it for Rs. 25,000 subject to the second mortgage but not subject to the plaintiff's fourth mortgage as he had no notice of that, the suit having been filed on 4th March 1890 and the plaintiffs' mortgage deed not having been registered till May 1890 although executed on the 23rd February 1890. Revanur Subramaniya Iyer having become the owner of the forest, mortgaged it in favour of Grandhi Subbiah Chetti from whom he had borrowed Rs. 7000 towards the purchase-money. Grandhi Subbiah Chetti assigned his mortgage rights to the appellant for Rs. 17,000 and the latter brought a suit in 1914 and got a decree for Rs. 21,724. Revanur Subramaniya Iyer in 1902 released his right of redemption for the sum of Rs. 15,000 and odd in favour of the Rajah under Exhibit FF leaving the latter to redeem his mortgagee for Rs. 8800 but as the mortgage was not redeemed it culminated in the decree just referred to. The subject of this appeal is Rs. 3000 which remain in court deposit out of the purchase money paid on the second mortgage at the sale in 1918. The Subordinate Judge has held that the plaintiffs have a right to receive this

sum and that the appellant's (that is 25th defendant's) right must be subordinated to his, because the plaintiff's were not made parties to O. S. No 6 of 1890 under which the appellant derives his title.

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In this appeal the appellant's first contention is that Revanur Subramania Aiyar's purchase was free of the fourth mortgage as that mortgage was a transfer *pendente lite*. His second contention is that Revanur Subramaniya Aiyar's purchase was subrogated to the rights of the Commercial Bank, that is, the plaintiff in O. S. No. 6 of 1890 (the suit on the third mortgage) to which Mr. Bowden transferred his right as third mortgagee, and that the 3rd mortgagee is to be preferred to the fourth mortgagee under S. 48 of the Transfer of Property Act.

On the question of *lispendens* Mr. Sivaramakrishna Aiyar for the appellant has referred us to *Tilakdhari Singh v. Gour Narain*¹ and *Papi Reddi v. Narasa Reddi*². The learned Judges of the Patna High Court held that where an instrument purporting to transfer title to property requires to be registered, the title does not pass till registration has been effected. For the respondents it is contended that this decision is wrong as it is opposed to the provisions of S. 47 of the Registration Act (XVI of 1908) which declares that a registered document shall operate from the time from which it would have commenced to operate if no registration thereof had been required or made and not from the time of its registration. The cases quoted in that decision *viz.*, *Papi Reddi v. Narasa Reddi*² and *Sheo Narain Singh v. Darbari Mahton*³ can be distinguished. *Papi Reddi v. Narsi Reddi*² was a case of an oral contract for sale of land exceeding Rs. 100 in value for which a registered sale deed was required. In *Sheo Narain Singh v. Darbari Mahton*³ it was recognized that even registration may not pass title if there was no *animus transferendi*. On the other hand in *Veerakutti Coundan v. Ramaswami Asari*⁴ it was held that a mortgage deed takes effect from the date of its execution and not from the date of its registration. In *Bapuji v. Icharam*⁵ there is a decision that *lis pendens* will not apply to the case of registration of mortgage documents during the pendency of a suit.

1. (1920) 5 Pat. L. J. page 715

2. (1892) 17 L. R. 16 Mad. 464

3. (1897) 2 Cal. W. N. 207

4. (1916) 32 I. C. 481.

5. 2 P. J. (Bom. H. C.) 361.

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It is also argued that this is not a true case of *lis pendens*. The plaintiff's right to obtain a mortgage from the Rajah could be exercised without interfering with the rights of Mr. Bowden, the holder of the third mortgage, to obtain a decree and sell the mortgaged property. There is force in these arguments and in my opinion, the first contention of the appellant fails.

The respondents' answer to the second contention is that Subramaniya Aiyar had no right to be subrogated by virtue of his purchase and that he could not transfer such a right to Grandhi Subbiah as he only partially discharged the mortgage decree on 10 items. It has been held that even partial discharge of a mortgage will give the person who releases a prior encumbrance a right of subrogation to the extent of which the money advanced by him discharged that encumbrance. See *Saminatha Pillai v. Krishna Iyer* ¹, *Udit Narain v. Asharfi Lal* ² *Muthammal v. Razu Pillai* ³. And in *Chhajan Lal v. Muhammad Hussain Khan* ⁴ it was held that a purchaser at an auction sale in execution of a decree upon a prior mortgage, when a puisne incumbrancer has not been made a party to the suit, can hold up the prior mortgage as a shield against the puisne incumbrancer.

On the other hand in this court in *Besinath Karumani v. Devi Doss* ⁵ to which my learned brother was a party, it was held that the purchaser of a mortgaged property could not claim the right by subrogation to priority against a puisne incumbrancer when he has paid only a portion of the mortgage debt and a similar view was taken in *Hanumanthaiyan v. Meenakshi Naidu* ⁶ to which I was a party. We held that it was necessary that the first mortgage should be entirely discharged before a claim to priority as to the second mortgage could be sustained and *Gurdeo Singh v. Chandrika Singh & Chandrika Singh v. Rash Behary Singh* ⁷ is an authority for refusing the right of subrogation in aid of a mere volunteer who pays a debt for his own benefit only, being under no legal obligation to make the payment.

I feel considerable doubt in recognizing any right of subrogation existing in the purchaser Revanur Subramaniya

1. (1918) I. L. R. 38 Mad. 548.
2. (1916) I. L. R. 38 All. 502 at p. 505.
3. (1917) I. L. R. 41 Mad. 513 at p. 515.
4. (1919) I. L. R. 41 All. 456 at 460.
5. (1915) 29 I. C. 511.
6. (1910) I. L. R. 35 Mad. 183.
7. (1907) I. L. R. 36 Cal. 193 at p. 219.

Aiyar under the third mortgage decree. I think that he purchased the Karvetnagar forest subject to the second mortgage but not subject to the fourth mortgage, of which no notice had been received at the date of the institution of the third mortgagee's suit. As his purchase must be regarded as being a *bona fide* one made without notice of the fourth mortgage, I consider that he has a right to be preferred to the 4th mortgagee by reason of S. 48 of the Transfer of Property Act ; and Grandhi Subbiah Chetti by virtue of his loan Rs. 7,000 and mortgage became subrogated to that extent to the title of Revanur Subramania Aiyar ; and the appellant has succeeded to Grandhi Subbiah Chetti's rights by virtue of the assignment in his favour ; and by his subsequent mortgage decree he obtained all that remained of the right, title and interest of Revanur Subramania Aiyar to the Karvetnagar forest after he released the equity of redemption to the Estate Collector on behalf of the Rajah for Rs. 15,000 and odd under Ex-FF.

Although the 4th mortgagee is not bound by the decree in the 3rd mortgagee's suit (O. S. No. 6 of 1890) to which he was not a party (Vide 21 M. L. J. 213 and I. L. R. 40 All. 407) yet Revanur Subramania Aiyar having purchased in court auction both the rights of the 3rd mortgagee whose decree for Rs. 57,000 was not satisfied by the sale of item 2 for 25,000 as well as those of the Rajah mortgagor, can hold up the prior mortgage as a shield against the puisne incumbrancer (Vide 41 All. 456) and thus can claim an advantage over the 4th mortgagee by the natural priority of the 3rd mortgage over the 4th mortgage.

Two or three other contentions raised by the respondent's pleader in his endeavour to defeat the appellant's claim remain to be disposed of. First he argues that his mortgage is earlier in point of time-being of date 23rd February 1890 as against the plaintiff's assignor's mortgage of the 24th January 1894 and he relies on S. 48 of the Transfer of Property Act : but that section only applies to the order of mortgages created by the same person at different times. Grandhi Subbiah Chetti's mortgage of which the appellant got an assignment was created not by the Rajah but by Subramania Aiyar the purchaser of the forest. The next point is that the appellant's claim is barred by limitation as the charge created in favour of Grandhi Subbiah Chetty who lent Rs. 7,000 to Subramania Aiyar in 1894 was not sued upon within 12 years. I think that no

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question of limitation arises in the present claim. In O. S. No. 61 of 1914 the question of limitation was raised and it was then held that the suit was in time as far as the claim for a decree for sale was concerned, but that the personal remedy was barred. As the necessary parties were impleaded in that suit, the respondents are not entitled to raise the question a second time in this suit. Lastly there is the question whether Revanur Subramania Aiyar the auction purchaser at the sale in execution of the 3rd mortgage decree and the appellant, his successor in title, are not estopped from contending that they have acquired priority over the plaintiff's mortgage. In *Kalidas Chaudhuri v. Prasannakumar Das* ¹ it was held that decree-holders are bound to specify in the sale proclamation any incumbrance to which the property was liable, that a mortgagee who purchases at a sale in execution of his decree on the mortgage is bound by an estoppel that would have bound his mortgagor, and that a decree-holder purchaser cannot set up in his own favour an encumbrance not specified in the execution proceedings. But the auction purchaser in the present case was not also a decree holder. Moreover the 3rd mortgagee did not cause the 4th mortgagees to change their position by his failure to implead them in his suit. Nor has the appellant taken up a position inconsistent with that of the 3rd mortgagee decree-holder or that of the auction purchaser, Revanur Subramania Iyer. In my opinion, no question of estoppel arises in the present suit like that which arose in *Kalidas Chaudhuri v. Prasannakumar* ¹.

I am therefore of opinion that the appeal should be allowed and the lower court's decree should be amended in the manner directed in my learned brother's judgment.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SADASIVA AYYAR AND MR. JUSTICE COUTTS TROTTER.

Govinda Pillai ... Appellant * (Petitioner Assignee-decree-holder.)

v.

Dasai Goundan and another ... Respondents (Respondents-judgment-debtors.)

Limitation Act—S. 20 Part-payment of principal—Agent duly authorized to make payment—Fact of payment appearing in handwriting of agent—Meaning—Final decree for sale—Part of hypothecated property acquired under Land Acquisition Act—Compensation money paid into Court—Payment out of same to decree holder under order of Judge—Payment if affords fresh starting point of limitation for execution.

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On 20—9—1912 a final decree for sale of the hypothecated properties was passed. Items 4 and 5 of the hypothecated properties were afterwards acquired by the Government under the Land Acquisition Act and Rs. 3400 (compensation money) was deposited in Court for the Government on 11—8—1914 to the credit of the suit. On the very same date the said sum of Rs. 3400 was paid out to the decree-holder on account of his decree, the judge signing a paper, indicating that the amount was paid to the decree-holder in the presence of the judge and through the court. On a fresh execution application for sale of two other hypothecated properties filed on 10—8—1917, held, that the application was not barred by limitation.

The payment of Rs. 3400 was part-payment of the principal of the decree debt; the judge, by whose order the payment was made, was an agent duly authorized by the judgment-debtor to make it, and the fact of the payment appeared in the handwriting of the Judge within S. 20 of the Limitation Act. The requirements of that section were therefore satisfied, and the decree-holder had a fresh starting point from the date of the payment.

Appeal against the order of the District Court of Coimbatore in E. P. No. 1 of 1917 and E. P. R. No. 15 of 1917 in O. S. No. 60 of 1910.

K. S. Krishnaswami Aiyangar, N. S. Ramaswami Aiyangar and P. S. Ramaswami Iyengar for appellant.

T. M. Krishnaswami Aiyar and V. Ganapathi Aiyar for respondents.

The court delivered the following

Judgments:—Sadasiva Aiyar, J.—The assignee-decree-holder is the appellant. The following are the relevant facts and dates. On 20—9—1912 the final decree for sale of the hypothecated properties was passed. Items 4 and 5 of the hypothecated properties were afterwards acquired by the Government under the Land Acquisition Act and Rs. 3400 (Compensation money) was deposited in court for the Government on 11—8—1914, to the credit of

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the suit. The decree amount with interest on that date amounted to Rs. 3926-0-0 according to the decree-holder. The decree holder drew the compensation amount of Rs. 3400 from the court on 11—8—1914 and he filed the present execution application for sale of two other hypothecated items on 10—8—1917. The questions for consideration are (1) whether the execution petition is barred by limitation and (2) what was the balance due under the decree, whether it was Rs. 500 and odd with interest from 11—8—1914 as claimed by the decree-holder or lesser sum and if so, what sum?

The lower court on 30th September 1919 held on the 2nd point that only Rs. 103-7-8 was the sum due on 11—8—1914 under the decree. On the first point it held that because on 11—8—1914 the compensation amount Rs. 3400 was paid to the decree-holder on account of the decree by consent of the judgment-debtors, S. 20 of the Limitation Act gave a fresh starting point of limitation and hence the execution petition of 10—8—1917 was not barred by limitation. It accordingly directed execution to issue for the Rs. 103 and odd with interest. This appeal by the decree-holder was based on the ground that really Rs. 500 and odd was due and not merely Rs. 103 and odd on 11-8-1914 under the decree. Having heard both sides and gone through the records, I agree with the lower court in its conclusion that only Rs. 103 and odd was really due on the above date. So the appeal fails and has to be dismissed with costs.

But there is a memorandum of objections filed by the 1st defendant (the judgment-debtor) and the contentions in that memorandum are:

1. The learned judge ought to have held that the payments made ex-parte having reference to their nature and mode did not come within S. 20 of the Limitation Act and the execution petition was therefore barred.

2. The courts below ought to have held that even otherwise the decree has been fully satisfied by payments made.

As regards the second contention that full satisfaction had been made there is nothing in it and the District Judge was right in finding that Rs. 103 and odd still remained due on 11-8-1914.

The much more important contention remains, namely, that "the payment made ex-parte" in August 1914 did not come

within S. 20 of the Limitation Act and could not therefor save limitation. S. 20 of the Limitation Act (omitting the words unnecessary for the decision in this case) is as follows :—
 “Where part of the principal of a debt is, before the expiration of the prescribed period, paid by a debtor or by his agent duly authorised in this behalf, a fresh period of limitation shall be computed from the time when the payment was made; provided that in the case of part payment of the principal of a debt the fact of the payment appears in the handwriting of the person making under the same. Explanation : Debt includes money payable under a decree.”

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The payment of Rs. 3400 was clearly part payment of the principal of the decree debt. But two other questions remain to be considered, namely, (1) whether the fact of the payment appears in the handwriting of the person making the same ; (2) whether the payment was made by the debtor or by his agent duly authorised in that behalf.

On the first question, the decree-holder in the case produced before us copies of court records showing that when the Rs. 3400 was paid out the judge, signed a paper indicating that Rs. 3400 was paid to the decree-holder in the presence of the judge and through the court. I think this record sufficiently satisfies the condition that the fact of payment should appear in the handwriting of the person making the same.

The only question that remains therefore for consideration is whether the judge can be called an agent duly authorised by the judgment-debtor to make the payment.

Notwithstanding some *obiter-dicta* of their Lordships of the Privy Council based on English decisions that the reason why an acknowledgment of indebtedness gives a fresh starting point for limitation is that it gives a fresh cause of action by reason of its implying a fresh promise to pay. I am clear that the provisions in Ss. 19 and 20 of the Indian Limitation Act could not have been based upon any such fiction of an implied new promise to pay. Under S. 19 Explanation 1, an acknowledgment signed by the party liable is sufficient *even when accompanied by a refusal to pay*, whereas in consequence of the fiction of an implied promise to pay being necessary under the English decisions, an acknowledgment accompanied by a refusal to pay is insufficient under the English Law to afford a fresh starting point for limitation as that fiction of an implied

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promise to pay becomes still-born in consequence of such refusal to pay. I think the Indian Law must be held to have required the handwriting of the person making the payment merely in order to exclude fraudulent oral testimony as to such payment just as the Statute of Frauds tried to prevent courts being flooded with perjury in the case of sales of goods etc. The fiction of an implied promise to pay and the accrual of a new cause of action by an unregistered acknowledgment of a payment of interest as such would not help mortgage creditors to obtain decrees for sale as the new promise not being evidenced by a registered deed cannot be made to affect immoveable property. The law of limitation is partly intended to promote diligence on the part of creditors in the matter of recovery of their debts. The concessions made in favour of creditors by the provisions of Ss. 19 and 20 of the Limitation Act are intended to express the view of the legislature that a creditor will not be considered wanting in such diligence in bringing his suit and he will not be penalised by the bar of limitation if he had been diligent enough to get the handwriting of the debtor or his agent to evidence an acknowledgment or the fact of part payment within the period of limitation.

Provided therefore the evidence of the payment is in a writing binding on the debtor it seems to me that the object of the legislature is satisfied, and in construing the words "Agent duly authorised" the courts ought in my opinion to be as liberal as possible. S. 21 (1) of the Limitation Act says that the expression "agent duly authorised in this behalf" in Ss. 19 and 20 shall "in the case of a person under disability include his lawful guardian, committee or manager or an agent duly authorised by such guardian, committee or manager to sign the acknowledgment or make the payment". This shows that the authorization need not be a voluntary authorization; for the guardian of a person under disability does not get his authority through any voluntary act of the person under disability but by law. In *Ragoonath Doss Cookman v. Rane Shiromonee Patta Mahadebee*¹ there is a sentence in the decision as follows: "As regards the sale made on the 8th March 1869 from which a sum of Rs. 206 was realized we think that cannot be considered a part payment under S. 21 so as to give a new period of limitation." S. 21 considered therein was S. 21 Act IX of 1871

¹ (1875) 24 W. R. 22.

which is similar to S. 20 of the present Limitation Act so far as the question under consideration is concerned. No reasons are given for the opinion. Further the point whether the condition as to the payment appearing in the handwriting of the person making the payment or his duly authorised agent was not raised or considered in that case. In *Ramachandra Ganesh v. Devba* ¹ no judgment was given and the court discharged the rule granted in favour of the decree-holder without giving any reasons. Whether the court intended to adopt all or only some of the arguments advanced by the vakil for the judgment-debtor as found in the report does not appear. One of such arguments was that an acknowledgment must have contained an express or implied promise to pay quoting English decisions. I have shown that those decisions are inapplicable in construing the Indian Limitation Act. Of course from an involuntary payment a promise to pay the balance cannot be implied. *Ragoonath Doss Cookman v. Rance Shirmanee Patta Mahadebee* ² was also quoted in that case not in the arguments before the High Court but only by the lower court in support of its opinion. It appears from the report that the payment relied upon was not part payment of the principal in the handwriting of the person making the payment but payment of interest and it was argued by the creditor that the recovery of rent decreed in a suit brought by the usufructuary mortgagee on a bond providing for payment of rent in lieu of interest was payment of interest on the mortgage bond. The defendants argued that the payment in satisfaction of the decree passed for rent is not a payment to the creditor of interest as such. It may be that this argument was accepted and so the rule was discharged by the Bombay High Court on that ground. I am unable therefore to accept the headnote of the reporter as really representing the opinion of the judges in that case. In *Oúdh Behari Pande v. Mahabir Sahai* ³ the only question decided was that because the part payment by sale in execution of the judgment-debtor's property did not appear in the handwriting of the judgment-debtor it could not save limitation. In *Brew v. Brew* ⁴ decided by 4 judges on the language of a Statute which required that "some part of the principal money or some interest thereon, shall have been paid or some acknowledgment of the right thereto

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1. (1882) I. L. R. 6 Bom. 626.
3. (1909) I. L. R. 31 All. 590.

2. (1875) 24 W. R. 22.
4. (1899) 2. Ir. (Q. B.) 163.

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shall have been given in writing signed by the person by whom the same shall be payable or his agent," in order to save limitation, the court followed the principle of the decision in *Chinnery v. Evans* ¹. In that case the payment by a receiver appointed under the Mortgage Act was held to be payment by the agent of the person liable to pay though the receiver was appointed by the court and not by the mortgagor and was appointed for the benefit of the mortgagee to receive "for him particularly" the rents of the mortgagor's property. Johnson (J) says in *Brew v. Brew* ² "Whether it is by the agency of a receiver or sheriff the payment is made to the creditor on foot of the debt which the debtor is bound in law to pay, and out of the debtor's rents or chattels as the case may be *for the debtor and on his account*: to the extent of such payment the debtor is discharged from so much of the judgment debt. I therefore think that such payments by a sheriff are not payments by a stranger to the judgment-debtor but are payments out of debtor's chattels "by a person paying for him and on his account what he is bound to pay". Per Lord Cranworth in *Chinnery v. Evans* ¹.

In *Lakshmanan Chetty v. Sadayappa Chetty* ³ a Bench of this court held that an acknowledgment of a debt made by a receiver by the court on behalf of a firm under dissolution is a valid acknowledgment saving limitation by reason of the provisions of S. 19 of the Limitation Act as he was an agent authorized to make the acknowledgment.

If a Sheriff of the court making the payment can be considered an agent of the debtor, I see nothing in principle or reason which should prevent me from binding that a court paying in the course of its duty the money due by the judgment debtor is also a legally constituted agent of the judgment-debtor for that purpose.

In the result, I think that the requirements of S. 20 are satisfied and I would dismiss the memorandum of objections also with costs.

Coutts
Trotter, J.

Coutts Trotter J :—I entirely agree. My Lord has covered the ground so thoroughly that I only propose to add a word on the last point. I think the principle deducible from *Chinnery*

1. (1864) 11 H. L. Cases 115

2. (1899) 2 Ir. Q. B. page. 163.

3. (1918) 35 M. L. J. 571.

v. *Evans*¹ this :— that if a debtor's assets are so placed either by his own act or by operation of law that if some one other than he alone can realise them for the purpose of making payments due from him, then the act of that other in operating upon the debtor's assets must be treated as the act of the debtor himself, the volition of the debtor in such a case being neither requisite nor relevant. If that be so, it appears to me that the words "his agent duly authorized in that behalf" in S. 20 of the Limitation Act are satisfied by the act of the Judge of the court which authorises the payment ; and that his handwriting is rightly described as that of the person making the payment.

A. S. V. *Appeal dismissed memo of objections dismissed.*

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR JOHN WALLIS, CHIEF JUSTICE AND MR. JUSTICE KRISHNAN.

Achammal ... Appellant * (Plaintiff)

v.

Narayanaswami Naicken (dead) and
others ... Respondents (Defendants
and L. R. of 1st Deft.

Hindu Law—Will—Construction—Bequest by husband to his two wives without power of alienation with remainder in entire properties to his daughter with absolute rights—Estate conveyed—Death of one wife—Surviving widow's right to entire properties by survivorship—Rights of daughter—Pleadings—Plaint—Amendment—Amendment in appeal—Practice.

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Where the will of a Hindu provided that after his death his two wives ought to take respectively the properties set out in Schedules I and II thereto and enjoy them without alienating them, and that, after their death, M, his daughter, should take the entire properties with all rights and enjoy the same, held that, on the death of one of the widows, the surviving widow became entitled to the entire properties by survivorship, as under the ordinary rule of Hindu Law, and that M, the daughter was entitled to the properties only after the life-time of the surviving widow.

Where, in a suit for a declaration and injunction the plaintiff offers in the Court of first instance itself to amend his plaint by adding a prayer for possession, but that court thinks an amendment unnecessary, the Appellate Court ought not to dismiss the suit on the ground that plaintiff was out of possession at the date of suit and yet did not pray for possession. The proper order to make in such a case is to give the plaintiff leave to amend his plaint.

Second Appeal against the decree of the Court of the Additional Subordinate Judge of Coimbatore in Appeal Suit No. 32 of 1919 (Appeal Suit No. 185 of 1919 on the file of the

* S. A. No. 1031 of 1920.

11th May, 1921.

I. (1864) 11 H. L. C. 115.

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District Court, Coimbatore) preferred against the decree of the Court of the Additional District Munsif of Coimbatore in O. S. No. 986 of 1917.

T. M. Krishnaswami Aiyar for appellant.

T. Ramachandra Rao for 2nd respondent.

The Court delivered the following

Judgment :—The Second Appeal raises a question as to the construction of the will of the deceased Krishnappa Naicken. The learned Subordinate Judge has considered a great many cases which do not appear to us to have very much bearing on this will. On the other hand, he has not considered as closely as he might have done what was the meaning of the testator as expressed in the will.

The testator had two wives and one of them had a daughter Mangammal. The will provides that after his death his two wives ought to take respectively the properties set out in Schedules I and II and enjoy them without alienating them. Then it goes on to say, "After the death of these two wives, my daughter Mangammal shall take the abovenamed entire properties with all rights and enjoy the same." One view of this will is that the properties in Schedule I were left to one widow for her life and the properties in schedule II to the other widow and that on the death of either of them the properties left to her should go to the daughter. That is not what the will says. The will says that it is after the death of the wives the daughter is to come in. These wills of Hindus should be read with reference to the ordinary notions of the Hindus. Under the ordinary Hindu Law when there are two widows, they take jointly and one succeeds to the other by survivorship. Very often, for the purpose of convenience, they partition the lands and enjoy them separately. What seems to us that the testator really meant was to provide himself for such a partition during the life-time of the two widows instead of leaving them to the risk of quarrels that usually arise. There is no reason for supposing that he intended to depart from the ordinary rule of Hindu Law by which the surviving widow takes the whole estate for her life time. On the contrary, the statement that the daughter is to take after the death of the wives shows that that was exactly what he meant.

We think that the learned Subordinate Judge was wrong in construing this will and that under it the plaintiff is entitled to the properties in both the schedules for her life.

Achammal
v.
Narayana-
swami
Naicken.

Another question was raised as to the form of the suit. The plaintiff did not sue for possession but simply for a declaration and injunction. But before the District Munsif she offered to amend the plaint but the Munsif did not think it necessary. The subordinate Judge has held that on this ground also the suit ought to be dismissed on his finding that the plaintiff was out of possession at the date of the suit. We think that the proper order to make is to give the plaintiff leave to amend the plaint within a week after the reopening and to direct that, on the amendment being made, the appeal be allowed, the decree of the lower courts reversed and the suit decreed, with costs throughout.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE OLDFIELD AND MR. JUSTICE RAMESAM.

Duvvury Ramamurthy ... *Appellant* * (*Plaintiff*).

v.

Pabbineedi Bulliraju ... *Respondent* (*Defendant*.)

Madras Estates Land Act, Ss 3 (3) and 189—'Holding', meaning of—Suit for partition and ejectment—Jurisdiction of Civil Court.

Ramamurthy
v.
Bulliraju.

In a suit by plaintiff in the Civil Court for ascertainment by division of his share of the properties which he and defendant were holding in common and for ejectment of the defendant from that share, the Civil Court returned the plaint for presentation to the Revenue Court. On appeal, *held* that the suit, so far as it was one for partition, was cognizable by the Civil Court and that the plaintiff should be allowed to withdraw his prayer for ejectment and sue in the Civil Court.

An undivided share in a parcel or parcels of land is not a holding within S 3 (3) of the Madras Estates Land Act.

Appeal against the decree of the Court of the Subordinate Judge of Cocanada dated the 12th December 1918 in A. S. No. 40 of 1918 preferred against the decree of the Court of the District Munsif of Cocanada in O. S. No. 39 of 1917.

V. Ramadoss for appellant.

P. Somasundaram for respondent.

Ramamurthy
Bulliraju

The Court delivered the following

Judgment:—The plaintiff, here appellant, has sued for ascertainment by division of his share of the property, which he and defendant are at present holding in common and for ejectment of defendant from that share, on the basis that defendant is in possession of it as a non-occupancy tenant. The Lower Appellate Court returned the plaint for presentation to a Revenue Court.

The disposal would no doubt be appropriate, if the prayer for ejectment could be regarded separately and if that remedy were authorized by the Madras Estates Land Act in the circumstances. But the Act provides for the grant of relief only in respect of holdings; and the definition of holding in S. 3 (3) by reference to parcels entails in our opinion that only ascertained holdings are contemplated. This is consistent with Chapter X and is supported by the interpretation placed on the similar provision of the law in Bengal in *Sreemati Parbaty Debya v. Mathura Nath Binnerjee* ¹. Until the plaintiff has had the holding, in respect of which he asks for ejectment, ascertained, it will be meaningless for him to approach a Revenue Court; and this is the real substance of the complaint he makes against the lower court's direction to him to do so, that Revenue Court cannot grant partition.

We may at this point observe that the opinion of the Full Bench in *Sri Gadadhara Das Bavaji Mahant v. Suryanarayana Patnik* ² would appear on the pleadings to be fatal to plaintiff's prayer for ejectment. That however is no reason why he should be refused the other relief to which he appears to be entitled.

The course we take is accordingly to set aside the decision of the Lower Courts, to allow the plaintiff to amend his plaint by withdrawing the prayer for possession and to remand the suit to the District Munsif's Court for re-admission and disposal as a suit for ascertainment of plaintiff's share in the property, which, he alleges, is held by himself and defendant as tenants-in-common. Plaintiff must of course pay the deficient stamp duty on the prayer for partition within a reasonable time to be fixed by the District Munsif, since he has not paid duty on that account already.

1. 16 C.W.N. 877.

2. (1921) 41 M. L. J. 97; 44 M. 677.

Each party will bear his own costs in this and the Lower Appellate Court to date. Costs before the District Munsif will be costs in the cause.

A. V. V. *Appeal allowed and case remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE OLDFIELD.

Balapattabi Chetty and others, ... *Petitioners* in both petitions.*
(Plaintiffs.)

2.
Subbaraya Chetty and others, ... *Respondents in both (Defendants.)*

Court Fees Act. S. 7 (4) (f)—Suit for partition in a Joint Hindu family—Family trade—Accounts—Valuation—Court fee.

Where in a suit for partition among the members of a Joint Hindu family, part of the property to be divided consists of a family trade or business, the plaintiffs are at liberty to put an approximate valuation on their claim as regards the trade or business, the provision of law applicable, being S. 7 Cl. 4. (f) of the Court Fees Act. The plaintiffs are not bound to value that item of property in accordance with its value as afterwards ascertained in the course of the trial by the Commissioner appointed by the Court. *Kannaya Chetty v. Venkata. Narasayya* 1 *Beni Madhab Sirkar v. Gobind. Chandia Sirkar* 2. Relied on. *Raghavayya v. Ramanayya* 3 explained.

Balapattabi
Chetty
v.
Subbaraya
Chetty.

Petition under S. 115 of Act of V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order of the District Court of Coimbatore in C. M. A. No. 12 of 1919 preferred against the order of the court of the Principal District Munsif of Coimbatore in O. S. No. 96 of 1917.

In C. R. P. No. 888 of 1919.

Petition under S. 115 of Act of V. of 1908 praying the High Court to revise the order of the Court of the Principal District Munsif of Coimbatore in O. S. No. 96 of 1917.

S. T. Srinivasagopala Chari for petitioners.

S. S. Ramachandra Iyer and S. S. Subramania Aiyar for respondents.

The Court delivered the following

Judgment :—It seems to me that this case can be shortly dealt with. The real question is simply this: whether the

* C. R. Ps 443 and 888 of 1919.

28-2-1921.

(1916) L. L. R. 40 M. 1.

2. (1917) 22 C. W. N. 669.

3. (1920) 13 L. W. 262.

Balapattabi
Chetty
v.
Subbaya
Chetty

plaintiffs suing for partition, part of the property to be divided being composed of Mandi trade, were bound to value that item of property in accordance with its value as afterwards ascertained in the course of the trial by the Commissioner appointed by the District Munsif, or whether they were at liberty to put on it an approximate valuation in accordance with S. 7 clause 4 (f) of the Court Fees Act. It is argued that they were not at liberty to take the latter course because the account which has to be taken in a family partition differs from that to be taken in a suit ordinarily described as one 'for accounts', inasmuch as in the former there is no question of surcharging the accounting party or accounting for past dealings with the property or of recovering from him on account of negligence, fraud or other grounds as in the latter but the account is to be simply of the assets and liabilities available for division at the date on which the division is made. This distinction between the two classes of suits for accounts was drawn in connection with a suit apparently very similar to the present, reported in *Raghavayya v. Ramanayya* ¹, by a Bench of this Court, and I of course follow this decision. The existence of this distinction was however not kept in mind by the lower courts which treated the suit as one for a specific portion of the properties, ignoring its character as a claim for account.

The defendants (respondents here) have however, consistently with the suit being of the latter class contended that it must be regarded as a suit for the specific chattels or choses in action, which were available as the assets of the Mandi trade and that the items of stock in trade, debts and so on can be divided like any other items of ascertained property. This, it seems to me, is entirely inconsistent with any practical view of the matter. For it would be impossible until the assets and liabilities of the trade are ascertained to tell what each sharer in it would be entitled to. The language of the decision I have just referred to is moreover entirely inconsistent with such a view of the matter since the learned Judges referred throughout to the "taking of an account", in spite of their distinguishing the two possible classes of accounts, which could be taken.

Reference may also be made to two other cases, viz., the decision in *Beni Madhab Sarkar v. Gobind Chandra Sarkar* ², and the very full Order of Reference, which was adopted in the

1. (1920) 18 L. W. 262

2. (1917) 22 Cal. W. N. 669.

judgment eventually delivered in *Kannayya Chetty v. Venkata Narasayya* ¹. No doubt, in the second of these cases and in *Raghavayya v. Ramanayya* ², the question of valuation was not raised directly ; but in the Referring Order the language is quite inconsistent with any view of cases similar to the present involving claims to specific items. And further the learned Judges' description of possible claims, in which an approximate valuation can be adopted by the plaintiff, refers specifically to all suits for accounts without distinction. It does not therefore in any way suggest the inference that a suit for accounts incidental to the partition of joint family assets stands on any special footing. The Calcutta decision is directly in point, and there is nothing in the special procedure regarding the valuation of ordinary partition suits apparently followed in Calcutta to make that decision in any way inapplicable in Madras on the point, which I have to deal with.

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Lastly, it would be most difficult to understand the defendant's contention or to see how it would work in actual practice. *Ex-hypothesi*, the plaintiffs here, as in the ordinary suits for accounts against agents, partnerships suits, etc., are ignorant of the amount they have to claim, because the information available regarding it is in their opponent's hands. The plaintiffs can in fact only get at the information with the assistance of the court at the trial. It is impossible to understand how they can stamp the plaint in accordance with any fixed valuation, until that plaint has been accepted by the court or until some sort of enquiry has been held. The answer attempted is that the plaintiffs would be bound to file their plaint in accordance with a merely tentative valuation, which they would be entitled to amend subsequently, paying additional duty after enquiry into the defendants' objection. There is, however, no provision for a tentative valuation of that kind in the Court Fees Act. The only tentative or approximate valuation, which that Act contemplates, is in connection with the general categories of suits under S.7, clause 4, comprising suits for account, while the general procedure is quite different additional duty which may be found due not being payable until the decree has been passed and has to be executed in accordance with S. 11. Reference may also be made to the terms of O. 7, R. 2 of the Civil

¹ 1. (1916) I. L. R. 40 Mad 1 (F. B.)

² 2. (1920) 13 L. W. 262.

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Procedure Code. The essence of this allowance of an approximate valuation is that the plaintiff is suing for an amount which is unascertained and which cannot be ascertained until after the trial ; and that is equally the case with reference to the case I am dealing with at present and to cases involving surcharge, etc., claimed in suits for what I may call 'accounts proper'. The facts that the accounts may be gone into further in the suits of the latter kind than in suits of the former and that specific items will be open to surcharge or other attack in the latter and not so in the former are not sufficient to justify a distinction.

— In these circumstances the orders of the lower courts cannot be affirmed and must be set aside, the plaintiff's suit being remanded to the District Munsif's Court for readmission and disposal on merits.

It has been pointed out that quite apart from the question of valuation for purpose of jurisdiction, the valuation for purpose of court fee with reference to items of joint family property other than Mandi trade requires correction in accordance with the results of the Commissioner's enquiry. The District Munsif will call upon the plaintiffs to pay the necessary additional stamp duty in accordance with the usual procedure. Costs in all the three courts will be costs in the cause.

The Civil Revision Petition against the decision of the District Munsif is also allowed but no separate order is necessary.

A. V. V.

Order set aside.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE OLDFIELD AND MR. JUSTICE RAMESAM.

Pothi Kandiyil Vattoli Kalandar ... *Appellants* * (*Defendants*
and another ... 4. and 5.)

v.

Keloth Vattoli Puthooram ... *Respondents* (*Plaintiff and*
Kalandar and others ... *Defendants 1 to 2 and 6*).

Civil Procedure Code, S. 11—Res judicata—Incidental findings—Malabar Law—Mahomedans—Law applicable—Second appeal—Custom—Findings of fact

Kalandar
v.
Kalandar.

In order that an incidental finding in one proceeding shall be res judicata in another, it is essential that the issue in the second proceeding should have been raised and decided clearly in the first.

It may be proved as a matter of custom that the Marumakathayam law governs the devolution of the separate and exclusive property of a Moplah in Malabar. Such a custom is neither illegal nor opposed to public policy.

On a question of custom the High Court in second appeal is bound by the findings of fact of the lower appellate court but the High Court can consider whether the facts found are sufficient to support the custom.

Second appeals against the decrees of the Court of the Additional Temporary Subordinate Judge of North Malabar in A. S. Nos. 363, 320 and 322 of 1918, preferred, against the decree of the court of the District Munsif of Kuthuparamba in O. S. Nos. 569, 420 and 567 of 1916, respectively.

K. P. Ramakrishna Aiyar for appellants.

C. Madhavan Nair for respondents.

The Court delivered the following

Judgment:—The question on which the decision of these appeals turns is whether the parties in respect of the suit properties are governed by their own Muhammadan law or have adopted the Marumakathayam law. The question arises in this way. The family consisted of two brothers and two sisters. One of the sisters had a daughter Biyathumma who married the son of one of the brothers, Vattoli Tharuvaryi. The properties in dispute are the properties of Biyathumma, which descended to her two sons, Tharuvaryi Kutti and the present plaintiff. The 4th and 5th defendants (the present appellants) are the sons of Tharuvaryi Kutti. If the devolution of the suit properties is subject to the Muhammadan law, they are entitled

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to succeed. The lower Courts have found that, because they came to them from their mother, they are subject to Marum-makathayam law.

The first question is whether the matter is *res judicata* in consequence of a decision of this Court in S. A. No. 1498 of 1911. The present plaintiff in that litigation was the 12th defendant and the present 4th and 5th defendants were the sons of the then 1st defendant. Both the lower Courts have held that this was not *res judicata*. One reason for that conclusion is that the persons concerned were then co-defendants and were not in a position of active contest. But it is not necessary to rely on that to justify the decision. For another ground for the Lower Court's conclusion is that the matter in suit was not the devolution of the present suit properties, but of some other properties and that the rule applicable to the latter is not necessarily the rule applicable now. In that suit the question was directly of the devolution of some properties, which had been divided by a karar of 1052 between the two brothers and the two sisters who originally composed the family. Those properties are not identical with the properties with which we are concerned, and in paragraph 11 of the plaint in that case the plaintiffs said: "As there are persons who are entitled to the joint properties to which plaintiff is entitled through mother other than this plaintiff and defendants and as those properties are not properties obtained under this right, those properties have not been included herein. When the plaintiff requires to get those divided, fresh suit will be brought," meaning that the properties now in dispute had been expressly excluded from the claim he was then making. That being so, it is impossible to hold that the Court in disposing of his claim was concerning itself with the devolution of these properties at all.

It is said, however, that the devolution of the properties now in suit was considered indirectly, because in that case the karar of 1052 on which the parties' rights now depend was referred to. It is true that in the judgment of the Munsif and the Subordinate Judge some reference is made to this karar; very naturally, because, the question being of the law applicable to the parties argument might fairly be founded on it, so far as it was consistent or inconsistent with the custom in dispute. But in fact, the two lower Courts in that litigation came

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to no very distinct conclusion; and the High Court dealt with the case without any detailed reference to the karar (Ex. XIII) at all. In the leading judgment the conclusion is expressed in these words.—“It is true that neither of the Courts below has considered the question in the manner, in which in my opinion it should in strictness be considered and it is also true that some remarks seem to me with great difference to both the lower Courts meaningless. . . and I am unable to hold that the finding arrived at by both Courts is a finding based on such an erroneous mode of approaching it and in such disregard of the evidence as would entitle us to interfere with it in Second Appeal. It is clear that this is the effect of Ex. XIII : and the question which arose incidentally in connection with it was very much at large. In order that an incidental finding in one proceeding shall be *res judicata* in another, it is essential that the issue in the second proceeding should have been raised and decided clearly in the first. That condition is not fulfilled with regard to the judgment, on which the present appellants rely. We cannot hold that it is *res judicata*.

We turn then to the case on the merits. The law which these men clearly may be supposed to follow is the Muhammadan law or, as it is put in this case, the Marumakathayam law. The question is whether the deviation from it, which the respondents allege, has been established by them as a matter of family custom. The appellants contend, first, that it is not open to the respondents to establish such a custom on the ground, so far as we can understand it, that it would be immoral or contrary to public policy. Mr. Ramakrishna Iyer for the appellants has not been able to specify any head of morality or public policy, which would be infringed by such a custom. He relies on a reference in Moore's Malabar Law and Custom 3rd edition, page 326 to the fact that in 1855 the High Court questioned the propriety of two distinct laws of inheritance prevailing in the same family and to the decision of Mr. Holloway, as Subordinate Judge, against the validity of what he terms “a piebald system of descent” and to a Privy Council decision in 1871. We have not been able to obtain the full decisions in the two first mentioned cases and we do not think it safe to proceed on the account of them given by Mr. Moore. The Privy Council decision in *Serumat Umat*,

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v. *Palathan Vittil Naryacoothy Umat*¹ is reported in. Their Lordships simply said that the special family custom relied on was not alleged or proved with sufficient distinctness or certainty. There is a judgment of Subramania Iyer, J, in *Assam v. Pathumma*² in which the right of any party who alleged such a custom as this to prove it by evidence was clearly recognised. We may also observe that the experienced Subordinate Judge, who tried the case and is a native of Malabar, refers to the custom as not uncommon within his knowledge. In these circumstances, we can see no reason why such a custom should not be recognised, if it is sufficiently established.

The remaining question is whether the lower Courts were justified in holding it to be established on the facts which they found. We cannot in Second Appeal interfere with their findings of fact. We can only consider whether the facts found were sufficient to support the custom. There is first Ex. XIII, the karar already referred to which draws a clear distinction between property in the hands of the male members of the family and that in the hands of the two females Pallichy and Pathumma, making no provision for the devolution of the latter. The other language used in the two karars is clearly appropriate to the Marumakathayam devolution. There are further four instances of assertion by Tharuvaryi Kutti that he followed Marumakathayam law. On the other side nothing irreconcilable with the Marumakathayam devolution has been shown us. We accordingly think the conclusion of the lower Courts was fully justified.

In the result the Second Appeals Nos. 1298 and 1299 are dismissed with costs and Second Appeal No. 1300, in which the respondent is not represented, is dismissed without an order as to costs.

A. V. V. *Second appeals dismissed.*

1, 15 W. R. (P. C.) 47.

2 I. L. R. 22 Mad. 494 at p. 504.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE KUMARASWAMY SASTRI.

Kochunni Elaya Nair ... *Petitioner * in all petitions.*

Martial Law Ordinances II and III of 1921—Offence committed inside the Martial Law area—Arrest outside the Martial law area—Legality of—Dismissal of an application for bail by a Magistrate sitting outside the Martial Law area—Legality of—Sub-Divisional Magistrate having powers as a summary Court under the Martial Law ordinance, acting erroneously as a Martial Law court when he should have acted under his ordinary powers—Mere irregularity—Ordinary procedure under the Criminal Procedure Code how far affected by the Martial Law Ordinance.

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Elaya
Nair
In re.

The petitioner was alleged to have committed offences under Ss. 121, 395, 431, 436 and 380 of the Indian Penal Code within the Martial Law area in Malabar and was arrested on the 3rd September 1921 within the limits of Palghat Municipality outside the Martial Law area and kept in the Sub-Jail of Palghat; on the 6th of September an application for bail was put in before the Sub-Divisional Magistrate of Palghat who was also empowered to act as a court of summary jurisdiction constituted by the Martial Law Ordinance and was rejected.

On an application for a writ of a *habeas corpus* to cause the person of the petitioner to be brought up before the High Court for the purpose of determining the legality of his detention, *held*, that the accused could be legally arrested for the offence committed inside the Martial Law area when he was at the time of arrest at a place outside it and that the rejection of the bail application by the Magistrate was proper.

The provisions of the Code of Criminal Procedure relating to the arrest without a warrant by a Police Officer and the subsequent production before a Magistrate are not abrogated or suspended by the introduction of the Martial Law.

Per Spencer, J.—The dismissal of the application for bail by the Magistrate was legal, as the proper course to be taken by a Magistrate who has no jurisdiction is to decline jurisdiction and reject the application on that ground.

Per Kumarasami Sastri, J.—The order of remand in the case by the Magistrate acting under S. 167 of the Criminal Procedure Code as a Sub-Divisional Magistrate would be a proper exercise of his powers. The fact that he did not purport to act as a Sub-Divisional Magistrate is a mere irregularity and the High Court will not issue a writ of Habeas Corpus on that account.

The provisions of the Martial Law Ordinance III of 1921 make it clear that a Magistrate appointed under S. 6 cannot try offences committed outside the area, or hold court outside. There is nothing in the ordinance to show that as Magistrates appointed under the Code of Criminal Procedure they cannot exercise the functions assigned to such Magistrates outside the area when the proceedings have not reached the stage of a trial but are only in the course of investigation preliminary to the offender being charged before a Magistrate. When a divisional Magistrate is also appointed to try offences under S. 6 of the Ordinance there is nothing to prevent his exercising the ordinary powers of a Magistrate outside that area and arresting or remanding persons charged with offences inside the Martial Law area with a view to their being brought to trial inside the area or before the Special Tribunal.

* Cr. M. P. Nos. 409, 410 and 411 of 1921.

19th September, 1921.

Kochunni
Elaya
Nair
In re.

Petition praying that in the circumstances stated in the affidavit filed with Criminal M. P. No. 411 of 1921 on the file of the High Court, the High Court be pleased to issue a writ of *Habeas Corpus* calling upon Mr. G. Batty, a summary Magistrate under the Martial Law Ordinance in South Malabar to cause the body of Kochunni Elaya Nair, Petitioner herein to be produced for the purpose of determining of adjudging the legality of his detention.

Crl. M. P. No. 410 of 1921.

Petition praying that in the circumstances stated in the affidavit filed with Crl. M. P. No. 411 of 1921, on the file of the High Court, the High Court will be pleased to issue a writ of *certiorari removing* to this court for the purpose of being quashed the proceedings of Mr. G. Batty a summary Magistrate under the Martial Law Ordinance in South Malabar, ordering the arrest and detention of the petitioner herein.

Crl. M. P. No. 411 of 1921.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to issue an order directing the release of the petitioner on bail pending trial of offences if any against him.

S. Srinwasa Aiyangar for petitioner.

The Public Prosecutor (J. C. Adam) for government.

The Court delivered the following

Spencer, J

Order:—*Spencer, J.*:—This is an application for the issue of a writ of *Habeas Corpus* to cause the person of Kochunni Elaya Nair to be brought up before the High Court for the purpose of determining the legality of his detention. The accompanying affidavit states that Kochunni Elaya Nair the secondstane of the Mannarghat Nair family was arrested on September 3rd and imprisoned in the Palghat Sub-Jail. It is alleged that he had at the moment of arrest just arrived at his own residence situated within the limits of the Palghat Municipality and that after some question being put to him as to the Moplah outbreak at Mannarghat the Assistant Superintendent of Police directed the Inspector to take him into the Sub-jail, that no warrant of arrest was shown to him and that he was not told anything about the offence with which he was charged. He was accordingly taken to the Sub-Jail, and on the 6th September an application for bail was put in before the Sub-Divisional Magistrate of Palghat and was summarily rejected. It is

added that the Taluk of Palghat, and the town of Palghat within which the petitioner's residence and the Sub-Jail are situated, are outside the Martial Law area.

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Nair
In re.

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The Public Prosecutor informs us that he is instructed by the District Magistrate of Malabar to say that the accused is charged with having committed offences under Ss. 121, 395, 431, 436, and 380 I.P.C. and abetment of the same committed within the Martial Law area and that he will be sent up for trial by the Special Tribunal constituted under Ordinance No. III of 1921 of the Government of India published in the Gazette of India, September 5, 1921.

Mr. S. Srinivasa Iyengar on behalf of the petitioner contends—(1) that the accused could not be legally arrested for an offence committed inside the Martial Law area when he was at the time of arrest at a place outside it and (2) that the Magistrate Mr. Batty, before whom he was brought and who refused to release him on bail was at Palghat, a place outside the Martial law area, and had no jurisdiction to exercise his powers at that spot seeing that clause 6 of Ordinance No. II of 1921 dated 26th August 1921 provides for the constitution of summary courts of criminal jurisdiction for the purposes of this Ordinance in any administration area that may be proclaimed as a Martial Law area under clause 2. He argues that “in any administration area” means within the area and not for that area.

The first point for which the learned Vakil is contending is a very strange one. It amounts to this that an offender has only to slip out of the Martial Law area to be immun from arrest and trial for acts done by him inside that area. The ordinary rule as to jurisdiction is that it is the area within which the offence is committed and not the place where the offender may be found that determines the court which has jurisdiction to try the offence : See S. 177 of the Code of Criminal Procedure. S. 54 of the Criminal Procedure Code authorizes any police officer to arrest without a warrant and without an order from a Magistrate a person who has been concerned in any cognisable offence, and the offences referred to by the Public Prosecutor or some of them are cognizable offences. S. 58 authorizes a police officer, for the purpose of arresting without warrant any person whom he is authorized to arrest

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under this Chapter (V) to pursue such person into any place in British India. S. 60 directs a police officer making an arrest without warrant to take the person arrested without unnecessary delay before a Magistrate having jurisdiction in the case. There is no alteration of the law in this respect in consequence of the constitution of Martial Law courts. The provisions of the Code of Criminal Procedure are not abrogated or suspended by the introduction of Martial Law. On the contrary, clause 12 and the other clauses of Ordinance No. II indicate that the courts constituted under the ordinance will follow, as far as possible the procedure laid down in the Code. Presumably the police will as early as possible take the petitioner into the Martial Law area and obtain the orders of a court constituted under that Ordinance. This they can do without any order of the nature of an extradition order seeing that the whole of the Malabar District, a portion of British India, is under the administration of the British Government. It is for the petitioner's vakil to show that the police acted without jurisdiction in this instance and as he has not succeeded in doing this the first point raised by him fails.

I now proceed to deal with the second contention raised. The powers vested in this court to issue writs of *Habeas Corpus* in the Presidency town are contained in S. 491 of the Criminal Procedure Code. Analogous powers are given us by S. 456 in respect of European British subjects in any part of our jurisdiction whether in the City of Madras or in the mofussil. In *In re Nataraja Iyer* ¹, Sundara Aiyar and Sadasiva Aiyar JJ. expressed an opinion following *In re Ameer Khan* ² that the High Court has by virtue of clause 8 of the Charter Act power to issue writs of *habeas corpus* even outside the City of Madras and in respect of all British subjects whatsoever. Assuming that these learned Judges were right in this view, if we attempt to issue a writ of *Habeas Corpus* in the present case we are confronted with clause 16 of Ordinance No. II of 1921 which declares that no court shall have authority to make any order under S. 491 of the Code of Criminal Procedure or to revise any order or sentence or to transfer any case from a summary court or have any jurisdiction of any kind in respect of any proceedings of the summary court. But Mr. Srinivasa Iyengar contends that if a Magistrate vested with powers of a

1. (1912) 11 L. R. 86 Mad. 72.

2. (1870) 6 Beng. L. R. 392.

summary court in a Martial Law area steps outside that area and attempts to exercise his functions outside the territorial jurisdiction assigned to him by the Ordinance, his acts will be illegal and subject to our control and revision. We understand that Mr. Batty is the Sub-Divisional Magistrate of Palghat Division and that he ordinarily exercises the powers of a First Class Magistrate in Palghat which is outside the Martial Law area. If then the petitioner was brought before him by the police as being the nearest Magistrate referred to in S. 167 of the Code of Criminal Procedure he would, as Sub-Divisional Magistrate have authority to authorize the detention of the accused in such custody as he might think fit for a term not exceeding 15 days : or, if he had no jurisdiction to try the case he might order the accused to be forwarded to a Magistrate having such jurisdiction. If, on the other hand when the prisoner was brought before Mr. Batty, he was purporting to act as a court of summary jurisdiction constituted by the Martial Law Ordinance what would be the proper order he should make upon an application being made to him? The proper course to be taken by a Magistrate who has no jurisdiction would be to decline jurisdiction and to reject the application on that ground. We must now see what is the illegal act which Mr. Batty is alleged to have committed according to the affidavit attached to the petition. This affidavit states that when an application for bail was put in before the Sub-Divisional Magistrate on the 6th September he summarily rejected the application without even hearing the vakil. Now to summarily reject an application would be the only course open to a Magistrate who finds he has no jurisdiction to deal with it; and in this view there was nothing illegal in the procedure of Mr. Batty and no act committed by him with which we could interfere assuming that we have the power to do so. It is not stated in the affidavit that Mr. Batty ordered the petitioner to be remanded to prison but it is alleged that it was the Assistant Superintendent of Police who said "Better shove him in the Fort to-day" and directed the Inspector to take him there.

The result is that this point also fails and the application is dismissed.

Kochunni
Elaya
Nair
In re.

Spencer, J.

Kochunni
Elaya
Nair
In re.

Spencer, J.

There is a connected Cr. M. P. No. 410 of 1921 applying for the issue of a writ of *certiorari* which fails and must be dismissed for the same reason.

As regards Cr. M. P. No. 411 of 1921 which is an application to release the petitioner on bail, the information that we have is that the petitioner is arrested in connection with non-bailable offences. No further details are before us and in the absence of such details we should not in any case exercise a discretion in the petitioner's favour. That petition is also dismissed.

Kumara-
swami
Sastri, J.

• • *Kumaraswami Sastri, J.* :—This is an application for the issue of a writ of *Habeas Corpus* by the petitioner who is charged with having committed offences under Ss. 121, 395, 431, 436, and 380 of the Indian Penal Code alleged to have been committed by him within the area proclaimed to be under Martial Law. He was arrested by the police while he was in Palghat a place outside the area and was remanded to Jail by Mr. Batty (who is the Sub Divisional Magistrate of the Palghat Division and also a Magistrate invested with summary powers of trial under the Martial Law Ordinance) under orders of the Military Commander for the purpose of the petitioner being sent for trial before the Special Tribunal constituted under Ordinance III of 1921. The grounds urged on petitioner's behalf are (1) that the police had no power to arrest a person who commits an offence within the Martial Law area but is found outside : (2) that the jurisdiction of summary courts and of Magistrates empowered to try offences conferred by Ordinance II of 1921 is purely territorial and that consequently Mr. Batty who purported to act as a Martial Law Magistrate outside the Martial Law area is without jurisdiction thus making the detention in jail illegal. It was also contended that the special tribunal constituted under Ordinance III would have no power to try offenders who are found outside the Martial Law area even though the offences were committed within the area. I do not think it necessary to go into this question which is one to be decided by the tribunal when the petitioner is placed before it for trial.

The power of the High Court as an abstract question of law, to issue a writ of *Habeas Corpus* in the present case is not contested by the Public Prosecutor though he contends that the facts of the case will not justify the High Court in issuing

the writ. It has been held *in re Nataraja Iyer* ¹ and *in re Amir Khan* ² that the court has jurisdiction having inherited the power from the Supreme Court. This jurisdiction is apart from the power conferred by S. 491 of the Code of Criminal Procedure and is in no way curtailed by the provisions of the section. The Martial Law Ordinance excludes powers conferred by S. 491 and does not refer to the general jurisdiction to issue the writ. Moreover S. 16 cannot apply to cases where the acts of the Martial Law Magistrates are wholly without jurisdiction, for example when he proceeds to places outside the Martial Law area and tries persons or passes sentences. It only applies to acts done within the jurisdiction and powers conferred by the Ordinance however illegal or irregular such acts may be, and not to proceedings passed wholly without jurisdiction.

Kochunni
Elaya
Nair
In re.

Kumara-
swami
Sastri, J.

As regards the first contention, I do not see anything in the Martial Law Ordinance which prohibits the arrest of persons who commit offences inside the Martial Law area but escape outside. The Penal Code has not been abrogated within such areas and so far as the arrest of such offenders is concerned the provisions of the Code of Criminal Procedure will apply so far as the arrest outside is concerned. S. 54 of the Code of Criminal Procedure gives the police power to arrest without a warrant a person who is charged with the offences with which the petitioner is charged and it seems to me that it makes no difference where the offence was committed so long as it is within British India. S. 60 directs that the person arrested should be produced without unnecessary delay before a Magistrate having jurisdiction in the case or before the officer in charge of a police station. Under S. 167 a Magistrate whether he had jurisdiction or not to try the case can order detention of the accused in custody for a period not exceeding 15 days and if he has no jurisdiction to try the case he can order the accused to be taken to the Magistrate having jurisdiction. Mr. Batty as Sub-Divisional Magistrate had power to remand the petitioner.

As regards the second objection it must be borne in mind that under S. 6 of the Ordinance it is only persons who are already Magistrates that are appointed under the provisions of the Code of Criminal Procedure to exercise the power of a

1. (1912) I. L. R. 36 Mad. 72.

2. (1870) 6 B. L. R. 392.

Kochunni
Elaya
Nair
In re.

Kumara-
swami
Sastri, J.

summary court. It is a specific power conferred on one who has the other ordinary powers of a Magistrate. There can be little doubt that their powers to sit as Magistrates trying offenders brought before the summary courts for trial are purely territorial and that they cannot exercise their powers of trial outside the Martial Law area. S. 2 provides that Martial Law shall be in force and the provisions of the Ordinance shall apply in the area specified in the schedule and such other area as the Governor-General in Council may by notification direct. S. 3 refers to the administration of Martial Law in any area in which Martial Law is in force. S. 6 provides for the establishment of summary courts in any administrative area. S. 7 directs that no summary court shall try any offence unless such offence was committed in the administration area in which the court is constituted. These provisions make it clear that a Magistrate appointed under S. 6 cannot try offences committed outside the area or hold court outside. There is however nothing in the Ordinance to show that as Magistrates appointed under the Code of Criminal Procedure they cannot exercise the functions assigned to such Magistrates outside the area when the proceedings *have not reached the stage of trial but are only in the course of investigation* preliminary to the offender being charged before a Magistrate. When a Divisional Magistrate is also appointed to try offences under S. 6 there is nothing to prevent his exercising the ordinary powers of a Magistrate outside the area and arresting or remanding persons who are charged with offences inside the Martial Law area with a view to their being brought to trial inside the area or before the Special Tribunal.

Even if Mr. Batty was technically wrong in acting in his capacity of special Magistrate I think the defect would only be an irregularity as his act would have been perfectly legal if he had acted as Sub-Divisional Magistrate. When a Magistrate is vested with more than one power under one of which only he has power to order a remand purports to act in the exercise of another power which gives him no authority to do so, the case is one of irregularity which can be cured by the amendment of the order where there is no prejudice to the accused. It is not shown that the accused would be in a better position if Mr. Batty had issued the order in his capacity of Sub-Divisional Magistrate.

In cases like the present when the arrest itself is not illegal and the offences are non-bailable I do not think the High Court will be exercising a proper discretion in directing the issue of a writ and directing the accused to be brought before it. Even assuming that the remand is irregular there is nothing to prevent the police from arresting the accused the moment after his release is ordered and taking him before the nearest Magistrate and getting a remand. If it is brought to the notice of the Court that the Magistrate ordering the remand ought to have acted in one capacity rather than in another the proper course will be for the High Court to direct the Magistrate to remand the accused according to law.

Kochunni
Elaya
Nair
In re.
—
Kumara-
swami
Sastri J.

There is also another reason why I do not think I ought to interfere at this stage ; while the case was being argued the government constituted the Special Tribunal before which the petitioner would be sent for trial. S. 6, clause 1 of Ordinance III of 1921 dispenses with the committal of the accused for trial and all that has to be done is for the petitioner to be taken before it for trial. He can apply for bail to the Tribunal as it has all the powers of a Court of Session having original jurisdiction and as appeals from the Tribunal lie to the High Court he can move this Court if bail is wrongly refused. He has therefore an adequate remedy. I dismiss the petition for a *Habeas Corpus*.

The petition for the issue of a writ of *certiorari* is not pressed and is dismissed.

I do not think that I ought, at this stage and on the scanty materials before me, to direct the release of the petitioner on bail and I accordingly dismiss the petition without prejudice to his applying later on, if he is so advised.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SADASIVA IYER AND MR. JUSTICE SPENCER.

Subramania Gurukkal

... Appellant * (Plaintiff.)

v.

Ammakkannu Ammal and another

... Respondent (2nd defendant and 1st defendant's L. R.)

Subramania
Gurukkal
v.
Ammakkannu
Ammal.

Limitation Act—Article 144—Service Inam—Alienation by the holder of the office—Suit by successor to recover property alienated—Limitation—Starting point—S. 28—Effect.

Property attached to a hereditary office in a temple was sold in 1883 by the then holder of the office, and possession of the property given to the alienee. The alienor died in 1886, and was succeeded in the office by his son who held the office till 1915 and then resigned it in favour of his son, the plaintiff. In a suit instituted by the plaintiff in 1916 for a declaration of the invalidity of the alienation and for recovery of the property from the alienee, held that the suit was barred by limitation under article 144 of the Limitation Act.

Each successive holder of the office does not on appointment get a fresh right to sue to recover the emoluments, S. 28 of the Limitation Act will operate to extinguish not only the right of the alienor but also the right of all who claim to succeed him by virtue of an hereditary line of succession.

Second Appeal against the decree of the Court of the Additional Subordinate Judge of Chittoor in A. S. No. 38 of 1919 preferred against the decree of the Court of the District Munsif of Sholinghur in O. S. No. 458 of 1916.

N. Chandrasekara Iyer for appellant.

L. A. Govindaragava Iyer for respondents.

The Court delivered the following

Judgments :—Sadasiva Iyer, J. :—Plaintiff is the appellant.

He brought a suit for a declaration that the alienation made on the 11th June 1883 of the plaint properties by the plaintiff's father and grand-father in favour of the 1st defendant (the alienation having been by sale of the kudivaram interest in certain lands) was invalid in law. The lands were service inam granted by the Karvetnagaram Zamindar as emoluments for doing puja in a temple.

One of the questions raised in the case was whether the kudivaram and the melvaram both constituted the maniyam or only the melvaram. In *Muthu Goundan v. Perumal Aiyar*¹ the Full Bench decided in January of this year that there is a presumption in the case of grants of even inam lands (whether granted by the former ruling power or by a

* S. A. 706 of 1920.

11th April, 1921.

1. (1921) 40 M. L. J. 429 : 11 L. R. 44 M. 588.

Zamindar) that the grant was of both varams. I think that that opinion is binding upon us and I would therefore differing from the Lower Courts hold on this point that the grant was of both varams.

Another question was raised that the plaintiff was not the legal holder of the office of pujari on the date of suit as his father was alive (and is even now alive). The Lower Appellate Court held that on the true construction of the plaintiff's father's letter to the guardian of the Zemindar (that letter being Ex. Q.) and of the order of that guardian (Ex. A.) the father had not ceased to be the holder of the office, that the plaintiff was appointed by Ex. Q. merely to do the duties of the office as his father's proxy and that therefore the plaintiff's suit was unsustainable. Having however heard the two documents read and commented upon and seeing also that the plaintiff's father as plaintiff's 2nd witness deposed that he resigned the Devas-tanam service owing to illness, I think that on the true construction of these two documents the conclusion should be that the plaintiff's father did resign the office, that his resignation was accepted by the Zemindar's guardian and that the plaintiff was recognised as the holder of the office after such acceptance of the father's resignation. (I do not however agree with the appellant's learned vakil that it was the appointment by the guardian of the Zemindar that entitled the plaintiff to claim the office and not his hereditary right to succeed thereto on his father's ceasing to hold it). The next question is whether the suit is barred by limitation. Both the Lower Courts held that it was barred. The alienation, as I said before, was in 1883 made by the plaintiff's father and the plaintiff's grandfather together. As the plaintiff's grandfather was the person then solely entitled to the office, and the plaintiff's father had no right either to the office or to the appurtenant lands at that time, his joining in the alienation was of no legal effect and the sale must be taken as one made by the plaintiff's grandfather alone for all legal purposes.

The subsidiary question now arises whether that sale was wholly void as the sale of lands attached as emoluments to a religious office. In C. M. S. A. No. 21 of 1920 I held (differing from Abdur Rahim, J.) that lands attached as emoluments to a religious office are inalienable in the same manner as the office itself and that the sale of such lands is a void transaction.

Subramania
Gurukkal
v
Ammak-
kannu,
Ammal,
—
Sadasiva
Aiyar, J.

Subramania
Gurukkal
v,
Ammakkannu
Ammal
—
Sadasiva
Aiyar, J.

I do not wish to repeat the reasons which I gave in that case. That case however is pending in this Court in Letters Patent Appeal No. 19 of 1920. Even assuming that the alienation was valid till the death and for the life-time of the plaintiff's grand-father which occurred in 1886, the plaintiff's father could have set aside the alienation within 12 years of his succeeding to the office in 1886. He resigned his office only in 1915, that is, 29 years after he so succeeded to it. His resignation was probably made in order to set up his son to bring this suit as he evidently thought or was advised that he would himself be barred or estopped if he brought the suit to recover the lands. Now the question is whether when the successor of the original alienor is barred, the successor of that successor has got 12 years again from when he succeeded to the office to recover the immovable properties forming the emoluments of the service. The question is by no means free from difficulty. But I think that the decision of a Bench of this Court in *Dhanushkotirayudu v. Venkayala Venkatratnam* ¹ (which distinguished the Privy Council decision in *Jalandhur Thakur v. Jharula Das* ² and which has not been overruled or dissented from to my knowledge in any subsequent decision of this Court) is binding upon me and I would therefore hold that where lands constituting the emoluments of an office have been held by a person not entitled to the office for more than 12 years as an owner (and not as a mere mortgagee or lessee) he gets an absolute and indefeasible right thereto against all the succeeding office holders also.

In the result I would dismiss the second appeal with costs.

Spencer, J. :—I agree. It was conceded by the learned Vakil for the appellants that this was not a case falling under S. 10 of the Indian Limitation Act, (IX of 1908) which exempts from any limitation suits brought against persons in whom trust property has vested for recovery of such property on behalf of the trust. He did not refer us to any article of the Limitation Act which would give a longer period than 12 years for a suit to recover property that has been attached to an office in a temple; and I have no doubt that Art. 144 applies to the facts of this case. I am unable to accept the suggestion that each successive holder of the office gets on appointment a fresh right to sue to recover the emoluments. I think that

1. (1920) 38 M. L. J. 320.

2. I. L. R. 42 Cal. 244.

S. 28 of the Limitation Act will operate to extinguish not only his right but also the right of all who claim to succeed him by virtue of an hereditary line of succession. I would follow the decision *Gnanasambanda Pandara Sannadhi v. Velu Pandaram*¹ and *Dhanushkotirayudu v. Venkayala Venkataratnam*². In *Gnanasambanda Pandara Sannadhi v. Velu Pandaram*¹ the Privy Council laid down the principle that there was no distinction between the limitation periods applicable to suits for an office and suits to recover the endowments of such offices.

The learned Subordinate Judge has unnecessarily expressed an opinion in his judgment that the Zamindar's right of resumption became barred owing to the lapse of more than 12 years since he became aware of the alienation—Vide his letter Ex. O. He further expressed an opinion that it would not be in the Zamindar's power to make any new appointments to the office if the Zamindar's right of resumption had become barred. I do not think it necessary in this case to express any opinion as to the Zamindar's rights as grantor to recover the property attached as emoluments to a religious trust that has failed. This suit is brought by a holder of the office, and we have only to consider his title. I agree with my learned brother that the plaintiff's suit was barred by 12 year's adverse possession against him and his predecessor in office, his father, and that the second appeal should therefore be dismissed with costs.

A. S. V.

Second Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE NAPIER.

The Official Receiver, Trichinopoly... *Appellant* * (*Respondent*).

v.

Lakshman Aiyar

... *Respondent* (*Petitioner*
12th Creditor).*Transfer of Property Act, Ss 64 and 134—Transfer of a mortgage debt—Formalities.*

A mortgage debt can be validly transferred only in accordance with the provisions of S. 64 of the transfer of property Act. *Perumal Ammal v. Perumal Naicker*, 3. Relied on.

* A. A. O. No. 220 of 1920

24th January, 1921.

1. (1899) I, L. R. 23 Mad. 271, 10 M. L. J. 29. 2. (1920) 38 M. L. J. 320.

3. (1920) 40 M. L. J. 25.

Subramania
Gurkkal
v
Ammakkannu
Ammal
—
Spencer, J.

Official
Receiver,
Trichinopoly
v
Lakshman
Aiyar.

Official
Receiver,
Trichinopoly
v.
Lakshman
Aiyar.

Appeal against the order of the District Court of Trichinopoly dated 31st March 1920 in C. M. P. No. 777 of 1919 in I. P. Nos, 5 and 6 of 1918.

C. S. Venkatachariar for appellant.

S. Doraisami Aiyar for respondent.

The Court delivered the following

Sadasiva
Aiyar, J.

Judgments :—*Sadasiva Aiyar, J.* :—I am clear that by the amendment made in the definition of "actionable claim" on the Transfer of Property Act in 1900, the Legislature intended that when money is borrowed on mortgage of immoveable property, the creation of the security on the immoveables should be treated as material part of the mortgage transaction and that the mortgage debt should not be treated as validly transferred if the conditions imposed by the statute law as requisites for the valid transfer of the security have not been complied with. I think that the latest pronouncement of the learned Chief Justice in *Perumal Annal v. Perumal Naicker*¹ supports my above view.

The result is that the appeal has to be allowed and the respondent could be treated only as an ordinary creditor and not a secured creditor. The respondent will pay the appellant's costs in both Courts.

Napier, J.

Napier, J. : I agree.

The mortgage debt has not been legally assigned as correctly stated by the District Judge. S. 134 of the Transfer of Property Act has no application nor can any principle embodied therein be applied against the other provisions of the Transfer of Property Act.

Appeal allowed with costs here and in the court below.

A. V. V.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE RAMESAM.

Kothandarama Reddiar and another ... *Appellants* in all the Appeals Nos. 112 to 133 of 1920 (Plaintiffs.)*

v.

Chinnaswami Reddi and 21 others ... *Respondents (Defendants).*

Madras Estates Land Act—Dry lands—Rent on—Ryots' liability for—Lands left waste through his wilful neglect—Effect—Dry crops of wet lands—Wet rent for—Landlords' right to—Sufficient water available in irrigation source for raising wet crops—Effect.

Kothanda-
rama
Reddiar
v.
Chinnaswami
Reddi.

A ryot is liable to pay rent on dry lands left waste through his wilful neglect.

A ryot is liable to pay wet rents at the highest neighbouring waram rent, when dry crops are raised on wet lands when there is a sufficiency of water in the irrigation source for raising wet crops.

Second Appeal against the decree of the District Court of Chingleput in Appeal Suits Nos. 197 to 217 and 226 of 1919, presented against the decree of the Court of the Sub-Collector, Chingleput Sub-Division in Summary Suits Nos. 240, 249, 253 to 260, 265, 266, 274, 283, 287, 292, 297, 305, 308, 309, 315, and 273 respectively of 1918 on its file.

L. A. Govindaraghava Aiyar for appellants.

M. Narasimham and *A. Krishnaswami Aiyar* for respondents.

The Court delivered the following

Judgment :—In these suits there were two questions between the landlord and his tenants which arose for determination *viz.*, (1) whether the tenants should be made to pay rent on dry lands wilfully left waste ; (2) whether the tenants should be made liable to pay wet rents at the highest neighbouring waram rent, when dry crops are raised on wet lands when there is a sufficiency of water in the irrigation source for raising wet crops.

The District Judge has found both these points in favour of the tenants and has directed the proposed terms to be omitted from the pattas.

Kothanda-
rama
Reddiar
v.
Chinnaswami
Reddi.

We are unable to support his judgment.

In cases where waste is due to the neglect of the ryots, this court has held in *Ramaswami Servaigaran v. Athivarachariar* ¹ and in Second Appeals Nos. 2052 to 2062 of 1917 that the landlord is entitled to claim rent for lands left uncultivated. •

The respondents rely on the decision of a former District Judge in prior suits of 1897 which they claim to have the force of *res judicata*. But from a perusal of that judgment we find that in that litigation the defendants set up a custom to cultivate only in alternate years. The decision therefore on the issue in those suits whether rent should be paid for punjah lands when they are not cultivated was only a decision upon the liability of the tenants in the conditions then put forward, which did not cover the case of wilful waste or waste by default or negligence. It is not *res judicata* upon the question arising in these suits.

Upon the second point the ruling in *Arunachalam Chettiar v. Mangalam* ² and Second Appeals Nos. 2094, 2095 and 2097 of 1917 are clearly against the respondents, and we must follow them.

Accordingly we allow the appeals with costs throughout calculated on an aggregate fee of Rs. 20 per case in all the courts and allow the clauses to stand in the patta, with the modification that for the words "wilfully left waste" we direct the words "left waste through the ryot's wilful neglect" to be substituted, and for the words "facility for raising wet crops" we substitute the words "sufficient water in the tanks for raising wet crops."

The memorandum of cross-objections is not pressed and is dismissed with costs.

A. S. V.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE RAMESAM.

Korumbakkat parkumVengaal- ... *Appellant* * (1st defl.)
 asheri Moidin Kutti.

v.

Thuniyilandiyil Mariamumma ... *Respondents* (*Plaintiff and*
and others. *defendants 2 to 7.*)

Partition—Partial Partition—Rule against—Scope and Applicability—Co-owners or tenants-in-common and co-parceners—Distinction—Mahomedan Co-heirs—Partial partition—Suit by one of co-heirs for—Maintainability.

Moidin
 Kutti
 v.
 Mariam-
 umma

In the case of Mahomedans, the co-heirs are only tenants-in-common there being no joint family in the Hindu Law sense of the term. In the case of co-owners or tenants in-common, the rule against partial partition is not so rigid as in the case of co-parceners, and partial partition may be allowed if there is not much inconvenience to the other sharers, and if the plaintiff will otherwise be left without a remedy.

Appeal against the order dated 12-8-1919 of the Court of the Temporary Subordinate Judge of Tellicherry in A. S. No. 366 of 1918 (A. S. No. 574 of 1917 on the file of the District Court) presented against the decree of the court of the Principal District Munsif, Badagara, in O. S. No. 830 of 1916.

B. Pocker for appellant.

K. P. Kesavamenon for respondents.

The Court delivered the following

Judgment:—The facts of the case may be briefly stated. Defendants 4, 5 and 6 are Muhammadan brothers. The 7th defendant is their sister. The suit property belonged in jenm to their father who demised it on kanom to 1st defendant on 4th June 1903, Ex. C being the marupat. The defendants 4 and 5 granted a melcharth of the property to plaintiff by Ex. B (dated 20th February 1915) and on its footing the plaintiff brought a suit for redemption of the kanom (O. S. No. 616 of 1915). That suit was dismissed on the ground that Ex. B. was valid only as regards the 4/7th share of defendants 4 and 5 and was not binding on defendants 6 and 7 and the suit could not be converted into a suit for partition without the consent of the defendants. See *Mamu v. Kutti* ¹. The present suit is for parti-

* A. A. O. No. 70 of 1920.

23rd March, 1921.

1, (1882) I. L. R. 6 Mad. 61.

Moidin
Kutti
v.
Mariam-
umma.

tion and recovery of the 4/7th share. It may be mentioned that meanwhile the kanom in favour of 1st defendant had expired and the 1st defendant had a renewal under Ex. I from the 6th defendant. The Lower courts found that Ex. I is valid only in respect of the 2/7th share of the 6th defendant.

The 1st, 6th and 7th defendants contended that the suit was not maintainable, being one for partial partition. The Munsif allowed this contention; but the Subordinate Judge reversed his finding and remanded the appeal for disposal according to law. This appeal against the order of the Subordinate Judge has been filed only by the 1st defendant who repeated the contention before us. If this were a case of Hindu Law the objection would certainly hold good—Vide *Sundara Iyer v. Krishnamoorthi Iyer* ¹ and *Manjaya v. Shunmuga* ². But the objection can be raised only by the members of the family and not by strangers. See *Ibramsa Rowthan v. Thiruvengkataswami Naick* ³ where it is said that a stranger cannot enforce partition against the will of the other members without suing for a general partition. It follows that the objection may be waived by them and this can be done at any stage.

Again even as a rule of Hindu Law, it is a rigid rule only so far as joint family property is concerned being a substantial rule of Hindu Law—See Bakewell, J in *Manjaya v. Shanmuga* ². If the property is not joint family property and the parties are not co-parceners but only co-owners or tenants-in-common the rule is not so rigid and partial partition may be allowed if there is not much inconvenience to the other sharers and if the plaintiff will otherwise be left without a remedy—See *Radhakanta Shah v. Bipro Das Roy* ⁴, and *Syed Habibur Rasul Abdul Faiz v. Ashitu Mohan Ghosh* ⁵ and *Uma Sundari Debi v. Benode Lal Pakrashi* ⁶ and A. S. No. 133 and 184 of 1907. It is then merely a rule of processual law.

In the case of Muhammadans, the co-heirs are only tenants-in-common, and there is no joint family in the Hindu Law sense of the term. The rule can at best apply to the Muhammadans only in the manner it applies to tenants-in-common among Hindus, and we understand the case in 15 C. W. N.

1. (1916) 31 M. L. J. 317. 2. (1913), I. L. R. 38 Mad. 684 : 26 M. L. J. 576.

3. (1910) I. L. R. 34 Mad. 269 at pages 274-5 : 20 M. L. J. 743.

4. (1904) 1 C. L. J. 40.

5. 12 C. W. N. 640.

6. (1907) I. L. R. 34 Cal. 1026.

677 in which the parties were Muhammadans (distinguished, though not disapproved, in 23 I. C. 442) only to lay down that it is not desirable to allow a suit for partial partition among co-heirs, if it causes much inconvenience to the defendants who are co-heirs, because such suits lead to a multiplicity of suits and to endless litigation. That the scope of the rule as applicable to Muhammadans cannot be extended beyond this is clear from the observations of Ayling and Tyabji JJ in *Moideensa Rowthan v. Muhammad Kasim Rowthan* ¹.

Moidin
Kutti
v.
Mariam-
umma.

For the proper disposal of the appellant's contention, if necessary we would have to call for a finding on the point. We asked the plaintiff's counsel to ascertain from his client if he is willing to have joint possession with 1st defendant or, otherwise, so amend the plaint as to avoid the objection. The respondent's counsel has now stated that he is content with a decree for redemption of 4/7th share and joint possession.—See, *Palott Chandu v. Kolathuru Karammal* ².

The case will be remanded to the District Munsif for disposing of any other points that remain undecided, such as the value of improvements and for passing a decree for redemption and for joint possession of 4/7th share. Each party to bear its own costs in this appeal.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SADASIVA IYER AND MR. JUSTICE SPENCER.

Subramania Chetty ... Appellant * (Plaintiff)

v.

Chidambara Mudali ... Respondent (4th Deft.)

Hindu Law—Joint family—Manager—Mortgage of ancestral family property for purchase of other property—Validity against minor member—Purchase an improvident and speculative transaction—Effect.

Subramania
Chetty
v.
Chidambara
Mudali.

Where, in a suit on a mortgage bond executed by defendants 1 and 2. and by the 3rd defendant for himself and as guardian of the 4th defendant, his minor younger brother, all the defendants being members of a joint Hindu family, it appeared that the amount of the bond was raised for paying up a portion of the purchase money due in respect of other lands in a neighbouring village purchased by defendants 1 to 3 for their family.

* A. S. No. 150 of 1920.

20th April 1921.

1. (1918) 28 I. C. 895.

2. (1915) M. W. N. 189.

Subramania
Chetty
v.
Chidambara
Mudali.

Held, that the purchase was an imprudent and speculative transaction and that the suit mortgage of ancestral family lands for paying up a portion of the purchase money due in respect of such purchase was not binding on the 4th defendant's share in the mortgaged lands

Appeal against the decree of the Court of the Additional Temporary Subordinate Judge of Cuddalore in O. S. No. 12 of 1919.

Y. Suryanarayana and *P. C. Venkataramanayya* for appellant.

A. Venkatrayaliah and *L. Venkatanarasiah* for respondent.

The Court delivered the following

Sadasiva
Aiyar, J.

Judgments :—*Sadasiva Iyer, J.* :—The plaintiff is the appellant. He sued on a mortgage bond of May 1913 executed by defendants 1 to 3 for themselves and the minor members of their family, the third defendant acting as guardian of his younger brother, the fourth defendant, who was then a minor though he had attained majority on the date of this suit.

The only question in this appeal is whether the fourth defendant's one-sixth share in the mortgaged properties is also liable to be sold for the plff's debt. The facts are that defts. 1 to 3 purchased for their family in March 1913 under Ex. B for Rs. 10,000 lands in a neighbouring village. They seem to have had no money in cash on hand to pay the purchase-money, and in order to pay up Rs. 4,000 of that Rs. 10,000 they borrowed the said sum of Rs. 4,000 from the plff. under Ex. A on the mortgage of their ancestral properties, (the plaint properties). The question is whether the managing members including the elder brother (the father of the 4th deft. not being among the managing members who executed Ex. A) can bind the fourth deft's share of the ancestral properties for a debt borrowed for such purpose.

In re *Krishnaswami Doss Reddi* ¹ Sundara Iyer, J held that except for necessity or for the manifest benefit of the family an alienation by the managing members (in that case, by way of sale of the ancestral properties,) cannot bind a junior member's interests in the properties. In *SubramaniyaNadan v. Ramaswami Nadan* ² Ayling, J and myself held that, for the purpose of purchasing more lands for the family, the manager was not entitled to mortgage the family lands so as to bind the junior members'

1. (1912) M. W. N. 167

2. (1913) 25 M. L. J. 563

share. In *Ganesa Aiyar v. Amirhasami Odayar* ¹ the learned Chief Justice and Kumarswami Sastri, J held on the facts that no such necessity or benefit as will bind the junior members' share was proved though the alienor in that case was the father himself of the repudiating junior member. Kumaraswami Sastri, J. seems not to have dissented from the opinion of Sundara Iyer, J. in *In re Krishnaswami Doss Reddi* ² that manifest benefit is sufficient and that it is not necessary to prove necessity. He however says that recitals as to benefit to the family should be scrutinised carefully even if the alienation was made by a father having regard to the ease with which such recitals can be made by an improvident father in order to raise money. I might be permitted to say that, having regard to the fact that fathers and managing members very frequently set up junior members to repudiate transactions entered into by the former and take advantage of the fact that, as time passes, evidence to prove necessity or benefit tends to become weaker, I should rather be inclined not to insist on the very strong proof which Kumaraswami Sastri, J seems inclined to require in all cases and my sympathies are more in favour of the alienees. That seems to have been the reason why the Allahabad High Court in *Bohra Jeth Mal v. Dharam Singh* ³ when a mortgage of 1882 made by the managing members was sought to be repudiated by junior members about the year 1910, was inclined to hold on the evidence, differing from the lower court, that benefit to the family had been proved for the mortgage debt created by the actual managing members. In the present case, however, the evidence, viewing it even indulgently towards the plaintiff seems to me to amount only to this : that defendants 1 to 3 believed that it would be for the benefit of the family to purchase the lands offered for sale (and situated in another village) even if the purchase money had to be raised by mortgaging those lands themselves for a portion of the purchase money and by mortgaging the ancestral family lands under Ex. A for the other portion. The purchased lands however seem not to have yielded even the interest on the amounts borrowed and therefore I cannot say that the Lower Court's finding that the transaction was not for the benefit of the family is wrong. If so, the 4th defendant's interest were rightly exonerated.

Subramania
Chetty
v.
Chidambara
Mudali.
—
Sadasiva
Aiyar, J

1. (1918) M. W. N. 892

2. (1912) M. W. N. 167,

3. (1912) 14 I. C. 745

Subramania
Chetty
v.
Chidambara
Mudali.
—
Spencer, J.

I therefore dismiss the appeal with costs.

Spencer, J.—I agree: I think that the purchase of the lands at Mathur by the brother of the 4th defendant and his adult co-parceners was an imprudent and speculative one made without due care for the interests of the minor members of the family, as it involved the family lands being encumbered for payment of the purchase money, and as those adult members must have known that, if they could not pay the mortgage money out of the income of the lands, would put the ancestral lands of the family in danger of being sold in execution of a mortgage decree. The subordinate Judge was right in his finding and the appeal must be dismissed with costs.

A. S. V.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNAN AND MR. JUSTICE ODGERS.

Alagiriswami Mudali and others ... *Appellants* * (*Defendants.*)

v.

Akkulu Naidu

... *Respondents* (*Plaintiff*).

Alagiriswami
Mudali
v.
Akkulu
Naidu.

Transfer of Property Act, Ss. 60 and 74—Mortgage—Redemption—Effect on lease created by mortgagee—Possession of lessee if adverse.

When a mortgage is redeemed the rights of a lessee from the mortgagee *ipso facto* come to an end. Thereafter the lessee holds the property only as trespasser, unless a fresh tenancy is created either expressly or by implication from the conduct of the parties. This holds good whether the redemption is at the instance of the mortgagor or a puisne mortgagee.

Govindaswami Pillai v. Pethaperumal Chetty (1) *Ram Chand v. Rajbans* (2) Referred to.

Chunnappa Thevan v. Bashiappa Pillai (3) Distinguished.

Appeal against the order of the District Court of Madura in A. S. No. 79 of 1920 dated the 1st day of November 1920 preferred against the decree of the court of the Second Additional District Munsif of Madura in O. S. No. 225 of 1919 O. S. No. 516 of 1919 on the file of the court of the Principal District Munsif of Dindigul.

C. A. Seshagiri Sastri and P. V. Krishnaswami Aiyar for appellants.

A. Ramaswami Aiyar for respondent.

* A. A. O. No. 49 of 1921.

17th August, 1921.

1. 44 I. C. 839, 844;

2. (1906) 3 A. L. J. 517;

3. (1915) 2 L. W. 1132.

The Court delivered the following

Judgments:—*Krishnan, J.* :—I am unable to agree with the District Judge that when a mortgage is redeemed the lease created by the redeemed mortgagee is still subsisting and that by virtue of S. 74 of the Transfer of Property Act when it is a 2nd mortgagee that redeems the prior mortgage the redeeming mortgagee gets the landlord's rights as against the tenants of the latter.

Alagiriswami
Mudali
v.
Akkulu
Naidu,
—
Krishnan, J.

I consider when a mortgage is redeemed subsidiary rights created on the mortgaged property such as lease rights come to an end *ipso facto* and any former tenant continuing on the land must be treated as a trespasser thereafter unless of course from the conduct of parties or otherwise a fresh tenancy can be held to have been created or an implied tenancy arises " See *Govindaswami Pillai v. Pethaperumal Chetty* ¹, *Adjoodhya Singh and others v. Girdharee* ² and *Ram Chand v. Rajbans* ³. Our attention was called to the ruling in *Chinnappa Thevan v. Pazhaniappa Pillai* ⁴ where it was held that the possession of the tenants who were in occupation of the land under the mortgagee was not adverse to the mortgagor who had redeemed the mortgage under whom they were originally holding. So far as that case is taken to decide the question as a matter of law I am not prepared to follow it. *Seshamma Shettali v. Chickaye Hegade* ⁵ cited therein left the question entirely open and the Allahabad case cited, *The Collector of Basti v. Sarnam Gharak* ⁶ was the judgment of a single judge and with all respect to the learned Judge it is difficult to see how the tenancy created by the mortgagee continues after redemption when the learned Judge himself has held that it is not binding on the redeeming mortgagor.

In *Chinnappa Thevan v. Pazhaniappa Pillai* ⁷ however, there was a document, Ex' G, which was construed as transferring the mortgagee's rights to the mortgagor. In that case the mortgagor as assignee will have the rights of his assignor, the mortgagee, and the ruling may be supported on that ground.

As regards S. 74 of the Transfer of Property Act the District Judge has omitted to notice that the section gives the

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| 1. (1918) 44 I. C. 889 p. 844. | 2. 2 N. W. P. H. C. R. 199. |
| 3. (1906) 3 All. L. J. 517. | 4. (1915) 2 L. W. 1132. |
| 5. (1902) I. L. R. 25 Mad. 507. | 6. (1911) 8 All. L. J. 802. |
| 7. (1915) 2 L. W. 1132. | |

Alagiriswami
Mudali
v.
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Naidu.

Krishnan, J.

redeeming 2nd mortgagee only the rights and powers of the redeemed mortgagee *as such*. It does not pass any rights of his as landlord.

It follows from the above that in the present case the defendants were really trespassers as they refused to accept plaintiff as their landlord and repudiated his attempt to treat them as his tenants. The suit should have been valued for court fees as a suit for possession of property under S. 7 Cls. (5) Court Fees Act.

The respondent's vakil asks us to be allowed an opportunity to pay the right Court Fees and to amend his plaint. Though it is true he did not take advantage of the offer by the 1st Court I am inclined to grant him this indulgence provided he pays the court fees in one month's time from this day in the first court and amends his plaint as advised. In default the decree dismissing the suit with costs will stand. Plaintiff will pay the defendant's costs in this and the lower appellate court. The costs in the 1st court will be disposed of by that court.

Odgers, J.

Odgers, J. :—I agree. The lease has come to an end on redemption by 2nd mortgagee. It is quite clear that this was the position in English Law up to very shortly before the time when the Transfer of Property Act came into force here. The power of leasing was given to a mortgagee under certain conditions by S. 18 of the Conveyancing Act 1881 but that power was not incorporated in the Indian enactment. I cannot see any difference in principle (and we were referred to an authority on the point) which differentiates the case of redemption by a mortgagor from redemption by a subsequent mortgagee with reference to leases created by the redeemed mortgagee. The statement of the law in *Govindaswami Pillai v. Pethaperumal Chetty*¹ is in my opinion correct and the case in *Chinnappa Thevan v. Pazhaniappa Pillai*² cannot be treated as an authority on the point as it dealt with the special provisions (not reported) of Ex. G. The point is expressly left open by the judgment in *Seshamma Shettati v. Chickaye Hegade*³. The case in *The Collector of Basti v. Sarnam Gharak*⁴ is that of a single Judge and is unreported in the authorized reports. I am not prepared to follow it. There can further be no question of holding over once it is conceded that the tenancy can of course

1. (1918) 44 I. C. 839 at page 844.

8. (1902) E. L. R. 25 Mad. 507.

2. (1916) 2 L. W. 1132.

4. (1911) 8 All. L. J. 802.

be begun but the defendant's conduct here in repudiating the relationship of landlord and tenant when the mortgagee served him with notice to quit 4 days after he had redeemed clearly puts an end to any such contention. The defendants here are therefore in the position of a trespasser. I am unable to see how a tenancy created by a mortgagee does not come to an end in this country on redemption and I think the case where this has been held to take place in the case of redemption by a mortgagor must be held equally applicable to the case of redemption by a subsequent mortgagee.

Alagiriswami
Mudali
v.
Akkulu
Naidu.
—
Odgers, J.

S. 74 of the Transfer of Property Act only gives the redeeming mortgagee the rights and powers of the mortgagee *as such*. This does not extend to a case such as this. I agree in the order proposed by my learned brother.

A. V. V.

Decree modified.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR JOHN WALLIS CHIEF JUSTICE AND MR. JUSTICE KRISHNAN.

T. V. Tuljaram Row

... *Appellant*

v.

T. A. Ramachandra Row

... *Respondent.*

Madrās High Court Rules—Original Side—Rr, 203 to 208—Sale of property by Official Referee—Partnership suit—Proclamation of sale omitting to specify place of sale—Irregularity—Substantial injury—Application under S. 310 A of the C. P. Code, 1882—C. P. Code, 1908, O 21, R. 89.

Tuljaram
Row
v.
Ramachan-
dra Row.

Certain properties, moveable and immoveable, were sold in one lot by public auction by the Official Referee. The proclamation of sale did not specify the place of sale but no objection to the proclamation on that ground was taken by any of the parties either before the Registrar or before the Judge in Chambers under Rule 206 of the Original Side Rules. Everybody concerned understood that the Sale would be held, in accordance with the usual practice, at the premises and there was a large attendance of bidders at the Sale. On an application by one of the parties to set aside the sale after it had been concluded, *Held*, that there was neither material irregularity nor substantial injury to justify the setting aside of the sale.

Where in a suit for dissolution of partnership, properties are sold in public auction by the Official Referee for realising the partnership assets, it is not

Tuljaram
Row

competent to the parties to apply under S. 810 A of the C. P. Code, 1882 (O. 21, R. 89) to set aside the sale.

v.
Ramachan-
dra Row.

On appeal from the Judgment and order dated the 30th day of March 1920 of the Honourable Mr. Justice Kumaraswamy Sastri passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 378 of 1919.

G. Devasagayam and *K. Ramachandra* for appellant.

The Advocate-General (C. P. Ramaswami Aiyar) and *T. R. Venkatarama Sastri* for respondent.

• • The Court delivered the following

Wallis, C. J.

Judgments:—*The Chief Justice:*—This is an appeal from an order of the learned Judge on the Original Side refusing to set aside a sale by the Official Referee under the orders of the Court made in a partnership suit for the purpose of realising the partnership assets and the main ground of objection taken is that there was no place of sale mentioned in the proclamation of sale.

In O. 24 A of the Original Side Rules which provides for proceedings before the Official Referee, under the head of sales by the Official Referee it is provided that, unless otherwise ordered, all sales by the Official Referee shall be by public auction, and in cases of immoveable property, shall be held at the premises. Under that rule, even though the property to be sold includes movables as well as immovables the sale must be held at the premises when the properties are sold as one lot. Even in such cases the duty of bringing in the sale proclamation falls upon the party who has the conduct of the sale. Unfortunately in this case, a printed form of sale proclamation for a sale in execution of a decree was used which for some reason or other does not strictly follow the form given in form No. 28 in the Original Side Rules but omits the place of sale. Possibly this printed form comes from the office of the Official Referee by whom a great number of sales are conducted, and having regard to the rule I have just referred to, the name of the place of sale, is not mentioned because everybody is assumed to know it. If that is so, it is a distinct defect and the sooner this form of sale proclamation is altered so as to state the place at which the sale is to be held the better. But the question in this case

is whether it is open to the defendant at this stage to object to the sale on this ground and whether a material irregularity has been shown by which he was prejudiced so as to justify the court in setting aside the sale under O. XXI, R. 90 or at any rate in accordance with the principles prescribed by that rule.

Tuljaram
Row
v.
Ramachan-
dra Row
—
Wallis, C. J.

Under R. 203 of the Original Side rules the order for sale is to direct the applicant to bring into Court a proclamation of sale for the approval of the Registrar and he is to adjourn the cases to come on before the Judge in Chambers on a fixed day. Then under R. 205, the applicant is to bring in two copies of the proclamation of sale in form No. 27 or No. 28. Both these forms do contain the name of the place of sale. Then the Registrar, under R. 206, is to determine the manner of advertising and to fix the date and place of the sale. Under R. 208 copies of the proclamation approved by the Registrar are to be signed by him and the case is to be posted on the adjourned date before the judge in chambers who may then order the sale to proceed or make any such order as he thinks fit. That is the time when it is open to the parties to take any objection whatever the proclamation of sale. Under R. 206, it is only then that they can take any objections to the lots, the market value or the reserved price mentioned in the affidavit of the applicant; but they can also before the Judge in chambers equally take objection to such a manifest slip as the omission of the place of sale. No such objection was taken in this case although numerous other objections were urged including objections as to the manner in which the sale has been advertised. The reasons stated as to why no such objections were raised is because everyone understood that, following the practice prescribed by the rules for the Original Side, the sale being by the Official Referee, it would be at the premises which were described for sale in the sale proclamation. It is not necessary for the purpose of the present case to consider whether the appellant should be held absolutely barred from taking this objection to the absence of the mention of the place of sale in the proclamation because he did not take it before the Judge in chambers as he ought.

The decision of the Privy Council in *Arunachalam v. Arunachalam*¹ relates to an alleged insufficiency in the

1. (1888) I. L. R. 12 Mad. 19.

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—
Wallis, C. J.

description of the property to be sold as distinguished from the present objection to the absence of any place of sale in the proclamation. In that case, the Privy Council held that the failure to take the objection at the proper time prevented its being taken later as a ground for setting aside the sale. "It would be very difficult indeed", their Lordships say, "to conduct proceedings in execution of decrees by attachment and sale of property if the judgment-debtor could lie by and afterwards take advantage of any misdescription of the property attached and about to be sold which he knew well but of which the execution creditor or the decree-holder might be perfectly ignorant that they should take no notice of that, allow the sale to proceed, and then come forward and say the whole proceedings were vitiated. That, in their Lordships' opinion, cannot be allowed, and on that ground the High Court ought not to have given effect to this objection." In the present case we think all that happened merely amounted to an irregularity by which the appellant was not prejudiced. It appears from the affidavit, and is found by the learned Judge that this formal defect misled no body.

I may further say here that the handbills which have been exhibited do not contain the place of sale and the only inference which anyone with ordinary common sense would come to is that the sale was to be at the premises because no other premises was stated where the sale was to be. As the learned Judge has pointed out the sale was well attended and there is no reason to suppose that any possible bidder was left away. It was not a sale likely to draw a very large number of bidders because although no doubt the properties to be sold included desirable premises near the Popham's Broadway, yet the sale proclamation showed that they were subject to incumbrances of an unusual kind, and of such a nature as would possibly require litigation in order to ascertain their amount. Further the plaintiff's counter-affidavit states that, when objection was taken during the sale by Mr. Ramachandrier to the fact that the place of sale was not mentioned in the proclamation the vakil on the other side ran over to the Official Referee's room which is the only other place where the sale could possibly take place and also to the press close by in the High Court premises and found nobody to bid. Therefore there is no reason to differ from the learned Judge when he says that

what happened was an irregularity which did not prejudice the parties. It is quite different from some of those cases which have been cited and where the sale was ordered to be held at one place and was actually held at another place, or where the sale was ordered to be held at one hour and was actually held at another hour. These errors were calculated to seriously mislead possible bidders. In the present case the actual place no doubt was not mentioned as it ought to have been by a slip, but that non-mention in our opinion is not calculated to mislead anybody. There was the well-known practice in regard to sales by the Official Referee and in the absence of any mention as to the place of sale, the natural inference would be that the sale was to take place at the premises and if any one had felt any doubt about it and enquired, he would at once have been told so. There is also evidence that people came to the Official Referee's and enquired whether there were any copies of the proclamation of sale to be obtained at 'Popham's house,' Anna Pillai Street, the main premises for sale, which goes to show that they knew perfectly well that the sale was going to take place there.

Tuljaram
Row
r.
Ramachan-
dra Row.
—
Wallis C J.

We hold therefore agreeing with the Lower Court that in this case there was no material irregularity which would justify us in setting aside the sale under R. 90 or the principles embodied in that rule.

Another objection has been taken that the Official Referee refused to adjourn the sale at about 5-30 P. M. when called upon to do so on the ground that it was getting dark. In the first place we do not think that it was getting dark at about 5-30 P. M. on the 28th February. When I pointed out that according to our ordinary experience, it does not get dark at 5-30 P. M. on the 28th February it was alleged that was a very dark place but that is an objection which would apply equally to earlier portions of the day. This objection appears to us to be of a very frivolous character and to have been rightly rejected by the learned Judge.

Another objection was taken that the appellant was entitled under the express terms of O. 21, R. 89 of the Code of Civil Procedure to come in to set aside the sale on a deposit of the purchase-money plus 5 per cent. This rule appears to have no application to the circumstances of the present sale which is for the realisation of partnership assets in a partnership suit.

Tuljaram
Row
v.
Ramachan-
dra Row.
—
Wallis, C. J.

R. 89, which is old S. 310 A, provides, as has been recently held by the Full Bench, modes of relieving judgment-debtors from the hardships to which they are exposed by Court-sale in execution of decrees against them at great under-values. The rule says. "Where immoveable property has been sold in execution of a decree any person owning such property or holding an interest therein by virtue of a title acquired before such sale may apply to have the sale set aside on his depositing in Court a sum equal to 5 per cent. of the purchaser-money and for payment to the decree-holder the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered." The sale is obviously inapplicable to a case of sale on behalf of all parties to the suit for the purpose of realisation.

Then we are referred to R. 214 of the Original Side Rules which provides that an application under S. 310 (a) which corresponds to the present O. 21 R. 89 shall be made on Judge's summons supported by affidavit which shall set forth the objections to the sale or the confirmation thereof. That rule applies of course only to cases to which R. 89 of O. 21 is applicable; and we are clearly of opinion that R. 89 is not applicable to the circumstances of the present case.

The result is that the appeal fails and is dismissed with costs.

Krishnan, J.

Krishnan, J.—I agree.

A. V. V.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE AYLING AND MR. JUSTICE ODGERS.

Malli Chettiar

... *Appellant* * (*Plaintiff*).

v.

Veeranna Tevan and others

... *Respondent* (*Defendants*.)

Contract Act, S. 74—Penalty — Compound interest at the same rate on default of payment.

A stipulation to pay compound interest from the date of default at the same rate as the simple interest, is not a penalty within S. 74 of the Contract Act. *Sundar Koer v. Rai Sham Krishan* (1) relied on. *Venkataramiah Pillai v. Subramaniya Pillai* (2) not followed.

* S. A. No. 1228 of 1920.

10th May, 1921.

1. (1906) I. L. R. 34 Cal. 150.

2. (1916) 37 I. C. 799.

Malli
Chettiar
v.
Veeranna
Tevan.

Second Appeal against the decree of the District Court of Madura in Appeal Suit No. 756 of 1919, preferred against the decree of the Court of the District Munsif of Tirumangalam in O. S. No. 245 of 1919.

Mallu
Chettiar
v.
Veeranna
Tevan.

S. Krishnamachariar for appellants.

K. S. Jayarama Aiyar for respondents.

The Court delivered the following

Judgments:—*Odgers, J.* :—The short point for decision is whether a stipulation to pay compound interest from date of default at the same rate as the simple interest is a penalty within S. 74, Indian Contract Act.

Odgers, J.

There is authority for saying that a stipulation for payment of compound interest at the same rate is not a penalty but that a stipulation for payment of compound interest at a higher rate is (See the cases collected in Pollock and Mulla's Contract Act 4th Edition page 435).

As the Privy Council said in *Sunder Koer v. Rai Sham Krishan*¹ compound interest is in itself perfectly legal, but compound interest at a rate exceeding the rate of interest on the principal moneys, being in excess of and outside the ordinary and usual stipulation, may well be regarded as in the nature of a penalty. And again at page 157 referring to the amended explanation to S. 74, Indian Contract Act their Lordships say "The Indian Courts have invariably held that where the stipulation is retrospective and the increased interest runs from the date of the bond and not merely from the date of default, it is always to be considered a penalty, because an additional money payment in that case becomes immediately payable by the mortgagor." This latter observation has strictly no application to the present case as it is clear that the interest was only to be compounded from the date of default.

The law has been similarly laid down as to the first point noticed by their Lordships in *Jwala Ram v. Buchi Ram*² and by a Bench of this court in *Chantasala Seetharamiah v. Vadepalli Pitichayya*³ wherein the learned Judges followed the Privy Council case. Compare also *Lakhi Chand v. Pear Chand*⁴.

1. (1906) I. L.R. 34 Cal. 150 at p. 158.

2. (1916) 38 I. C. 583.

3. (1915) 28 I. C. 860.

4. (1917) 39 I. C. 106.

Mall
Chettiar
v.
Vecranna
Tevan.
—
Odgers, J.

Had this been all, one would have said with confidence that a stipulation to pay compound interest was not a penalty and that this is fairly deducible from the judgment of the Privy Council as first quoted above.

However a case of this court has been brought to our notice. It is reported in *Venkataramiah Pillai v. Subramaniya Pillai* ¹ and is to the effect that there is no difference in principle whether the interest is compounded on default at the same or a higher rate. There the claim was for Rs. 146,000 for Rs. 30,000 originally advanced.

Abdur Rahim, J. says :— (p. 800) that the Judgment of the Privy Council referred to above does not mean that in no case can the stipulation to pay compound interest, even at the same rate be regarded as a penalty. The learned Judge says "The exact point has been exhaustively dealt with by Mr. Justice Mookerjee in *Khagaram Das v. Ramsankar Das Parmanik* ² and I agree with him." Now that learned Judge in *Khagaram Das v. Ramsankar Das Parmanik* ² says:—

"The first contention of the respondents is that the stipulation for the payment of interest at an exorbitant rate upon the entire amount secured by the mortgage in the event of default of payment of one or two instalments was in the nature of a penalty. Before we examine this argument in the light of judicial decisions, it is desirable to point out that in the solution of this question, no real assistance can be derived from the class of cases in which there is a stipulation for payment of at an advanced note on default of payment of principal or interest on the due date or the other class of cases in which on default of payment of principal or interest, stipulation is made for payment of compound interest at the same rate as the simple interest originally agreed to be paid or at a higher rate."

The case before him was for 75 per cent. interest in default of payment of the instalments of a mortgage instrument.

As far as I have been able to see, there is no question of compound interest at all in that case but the learned Judge treats the stipulation as to the payment of interest at 75 per cent as penal, and therefore unenforceable. He further adds that each case must be treated on its own circumstances.

1. (1916) 37 I. C. 799.

2. (1914) I. L. R. 42 Cal. 652.

It would thus seem that the learned Judges in 37 I. C. 799 were wrong in construing the decision in 42 Cal. 652 as they did as applicable to a question of compound-interest, and that if that were the basis of their judgment the latter cannot be sustained. They were undoubtedly impressed by the very large claim for interest and Abdur Rahim, J., observes (page 801) 'But I fail to see why the stipulation for the payment of interest on interest in default of payment of regular payments of interest, as contemplated by the parties in this case, cannot be considered by way of penalty within the meaning of S. 74 if the parties so intended it.'

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It was held that having regard to the original rate of interest (18 per cent.) the stipulation for compound-interest was by way of penalty. It is not urged that the original rate of interest as such should be relieved against. I am with deference unable to follow this decision which appears to me to be at variance with the decision of the Privy Council and with the course of decisions some of them by this court.

In my opinion, a stipulation to charge compound interest from date of default is legal provided it is at the original rate.

There will be the usual mortgage decree in plaintiff's favour with compound-interest at the contract rate up to date of suit, from that date interest (simple) at 6 per cent only. Time for payment will be extended to three months from this date. Plaintiff will have his costs throughout.

Ayling, J. :—I agree in the conclusion of my learned brother. It seems to be clear (vide *Sundar Koer v. Rai Sham Krishen* ¹, that a stipulation providing for the payment of compound interest on default is not penal by reason of the conversion of interest from simple to compound. The contention is that such a stipulation may nevertheless be treated as penal and relieved against if the court considers the contract rate of interest which continues after default, to be excessive. This seems to be the basis of the decision in *Venkataramiah Pillai v. Subramania Pillai* ². With all respect, it seems to me to be wrong. A penal clause must be one which imposes some penalty for the default, that is to say, which puts the defaulter in a worse position than he would occupy, if there were no penal clause. How can that be said to be the case

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1. (1906) I, L. R. 34 Cal. 150.

2. (1916) 37 I. C. 799.

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here? In the absence of the stipulation, defendant would be liable to pay the principal with simple-interest at the contract rate up to date of suit. The only change effected by the stipulation is the change on the system of computation from simple to compound; and this, as already stated does not render it penal. The contract rate of interest here is doubtless very high, but it is not contended that the court was competent to reduce it as regards the period up to date of default at any rate under the law in force at the time of suit. Neither, so far as I can see, can it be reduced for the subsequent period.

A. V. V.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE SPENCER.

The Honourable B. Rajarajeswara

Sethupathi Avergal, alias Muthu-

ramalinga Sethupathi Avergal ... *Appellant* * (*Plaintiff.*)

v.

Kuppuswami Aiyar and others ... *Respondents* (*Defendants.*)

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Indian Trusts Act, S. 43—Sole acting trustee, Powers of compromise of—Indian Limitation Act, Art. 91—Limitation for a suit to recover possession of the property granted under undue influence—Cause of action; when arises—Gift of a village by an extravagant Zemindar to a person formerly his mother's servant and subsequently his own Secretary—Validity of—A settlement of the Zemindari in trust for his son—Compromise by the trustee giving a permanent lease to the servant on half the usual rent—Legality of.

In September 1894, the late Rajah of Ramnad leased a village in the Zemindari for forty years to the 1st defendant who was for several years a trusted servant of his mother and who was subsequently his own vernacular secretary. In June 1895 he gifted the village as a religious gift on the second monthly ceremony after his mother's death to the 1st defendant with full powers of gift, sale etc. Under a settlement deed of July 1895 the late Rajah settled the Zemindari on his eldest son, the present plaintiff, constituting one Venkataranga Aiyar as Dewan Trustee under the settlement. In April 1902, the trustee under the settlement deed and the 1st defendant agreed, after a threat by the trustee to set aside the gift deed, that the 1st defendant should hold the village on perpetual lease on half the usual rent thus altering the gift with full ownership right in the village to a grant of a perpetual, heritable and transferable occupancy right on favourable rent. The late Rajah died in 1903 and the plaintiff brought this suit in 1913 within three years after his attaining majority to recover possession of the village with mesne profits.

Held that the arrangement of compromise entered into by the Dewan Trustee in 1902 was within the powers of the trustee under S. 43 of the Indian Trusts Act and valid and binding on the plaintiff.

The Dewan Trustee was a sole acting trustee within the meaning of S. 43 of the Indian Trusts Act.

If the instrument creating a trust authorises a sole trustee to execute the trusts and powers thereof, he is termed a sole acting trustee when he enters into an agreement of composition or other arrangement.

The gift made by the plaintiff's father was not one induced by undue influence. *Ismail Mussajee Mookerdum v. Hafizboo* (1) followed. *Taylor v. Johnston* (2) and *Howes v. Bishop* (3) referred to. *Bridgeman v. Green* (4) distinguished.

The effect of holding the compromise of 1902 as not binding on the plaintiff will be to revive the effect of the gift deed made in June 1895. *Khajoorinussa Bibi v. Rowshan Jehan* (5) and *Surjiram Marwari v. Barhamnudan Persad* (6) and *Harchandi Lal v. Sheoraj Singh* (7) followed.

The Plaintiff's suit to set aside the gift deed is barred by limitation under article 91 of the Limitation Act.

Per Sadasiva Aiyar, J.—The expression undue influence cannot be properly used unless either (1) confidence has been reposed on the person charged as where the latter is the solicitor, trustee, guardian etc or (2) unless the influence of the person charged is such that the other person stands in some sort of respect, awe or fear of him such as a child towards his parent or a pupil towards a spiritual preceptor and so on, so that the idea of displeasing him by a refusal to submit to his wishes puts the other in fear of prospective injury to his secular or spiritual welfare and happiness. An ordinary servant or dependent does not ordinarily hold such influence over his master.

Assuming that the gift deed was brought about by undue influence, the suit by the plaintiff to recover possession would be governed by article 91 of the Limitation Act as the plaintiff cannot obtain possession without setting aside the gift deed which is not a void transaction, but only voidable. *Janki Kunwar v. Ajit Singh* (8) followed.

The limitation period runs from the time when the facts entitling the person to have the instrument cancelled or set aside becomes known to him. The late Rajah who executed the instrument having known the facts perfectly from the very date of execution the cause of action arose immediately in 1895.

The cause of action for a suit to set aside a transaction on the ground of undue influence does not arise only when the undue influence ceases. *Raja Rajeswara Dorai v. Arunachalam Chettiar* (9) referred to. *Sri Kishen Lal v. Mussi, Kashmir* (10) distinguished.

The decision in 2 Nagpur Law Reports 98 relied on by Rustomji and Mitra in their treatises on limitation, holding that the onus of proof is on the defendant to show that the plaintiff's knowledge arose more than three years before suit, dissented from.

Appeal against the decree dated 29th day of March 1920 of the Court of the Subordinate Judge of Ramnad at Madura in O. S. No. 157 of 1913.

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| 1. (1908) 1 L. R. 33 Cal. 773. | 2. (1882) 19 Ch. D. 603. |
| 3. (1909) 2 K. B. 390. | 4. 97 Eng. Reports 22. |
| 5. (1876) 2 Cal. 184 at page 198. | 6. (1904) 1 Cal. L. J. 837 at page 348. |
| 7. (1916) 1 L. R. All. 39 179. | 8. (1887) 1 L. R. 15 Cal. 58. |
| 9. (1913) 1 L. R. 38 Mad. 321 at page 341; 24 M. L. J. 592. | |
| 10. (1916) 31 M. L. J. 862. | |

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S. Srinivasa Aiyangar and S. Sundararaja Aiyangar for appellant.

A. Krishnaswami Aiyar and N. Chandra Sekhara Aiyar for respondent.

The Court delivered the following

Judgments :—*Sadasiva Aiyar, J.*—The plaintiff appellant is the present Rajah of Ramnad, the owner of an ancient Zamin-dary. He brought this suit to recover possession with mesne profits for 3 years before suit of the village of Nedunthulasi within the area of his Zamindari which village had been alienated in three ways in the years 1894 1895, and 1902 respectively in favour of the 1st defendant (Kuppuswami Aiyar alias Naganatha Aiyar). Unless all these three transactions are set aside or are nullities it seems *prima facie* difficult to see how the plaintiff's suit in ejectment and for possession could succeed as each of the three transactions gives to the 1st defendant the right to hold possession of the village on the date of this suit, namely, 30-6-1913.

The first transaction was the lease granted by the plaintiff's father, the then Rajah, in September 1894 under Ex. C. Under this deed, the 1st defendant was entitled to enjoy the village as lessee for 40 years till the 1st July 1934, that is, till more than 21 years from the date when this suit was brought and more than thirteen years from the date on which this judgment is pronounced by me.

The second transaction was again an alienation by the plaintiff's father in June 1895 under Ex. I by which the village was gifted outright to the 1st defendant with full powers of gift, sale, etc.

The third transaction was an agreement between one Rao Bahadur Venkatarengier (who was constituted the present plaintiff) trustee under a settlement deed of July 1895 which I shall refer to again later on) on the one side and the 1st defendant on the other side and was made in April 1902. (Besides the Dewan Trustee and the 1st defendant, two Nattukottai Chetties, who were the lessees of the whole zamindari were also parties to the agreement, but it is unnecessary to refer to them further). That agreement is Ex. II. The trustee had threatened the 1st defendant with a suit to set aside the gift deed, (Ex. I, June 1895). Thereupon, the dispute was settled by this agreement, Ex. II, the 1st defendant agreeing to hold the village on

perpetual lease at half the usual rent and thus altering the gift under Ex. I (the gift deed of 1895) with full ownership right in the village to the gift of a perpetual and heritable and transferable occupancy right on favourable rent.

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Now the plaint ignores altogether the first transaction, namely, the 40 years' lease of 1894, attacks the other two transactions as "not bona fide" as "fraudulently and dishonestly obtained", as due to "undue influence" and in several other ways.

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The defendants (the defendants 2 and 3 being the sons of the 1st defendant) raised several pleas and the lower court framed nineteen issues for disposal. It is curious that no *specific* issue was raised in respect of the defendant's right to hold the village under the 40 years lease of 1894 and the liability of the plaintiff's suit filed in 1913 for possession to be dismissed on that short ground even though the 1st defendant specifically mentioned the 40 years' lease and relied upon it also in the 7th and 8th paragraphs of his written statement.

A few more facts and dates may be here mentioned. The late Rajah was born in 1868 and his father died when he was a boy of 4 or 5. Though he was only a titular Rajah and was for all practical purposes only the owner of an Impartible Zamindari Estate, the pomps and ceremonies and the retinue of a Royal Court were kept up in many ways in the Zemindar's residence and the unwholesome atmosphere of hangers-on, favourites, flatterers, idlers, the Zenana, etc, affected the zamindar's residence (known, of course, as the Palace) and his surroundings and the effects of such influence were too strong on the young man, (the plaintiff's father) notwithstanding that his estate was taken up by the Court of Wards during his minority and his education was conducted in Madras. His mother (the dowager Rani) had naturally great influence over him. She arranged to have him married to two wives at the same time when he was only 18 or 19 years old and by intrigues and importunities, persuaded the Court of Wards to consent to his marriage with one girl and had him married almost simultaneously to the two wives she had selected for him, it being considered a matter of dignity in these aristocratic families that the proprietor should have at least two wives living. He

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was a young man of extraordinary intelligence. He passed his Matriculation in the first class.

The lower court in dismissing the suit arrived at the following findings (among others) and I shall note them (as far as possible) in the words of the lower court.

(1) "The 1st defendant was not in a position to exercise undue influence over the late Rajah" and "the deed of gift in favour of the 1st defendant was not brought about by undue influence" and "the gift is valid". (This finding relates to the gift deed of June 1895, Ex. I.)

(2) "The agreement of 1902 between the Dewan Trustee and the lessees on the one hand and the 1st defendant on the other confirming the deed of gift with stipulation to pay half the Poruppu" was "beyond his" (the Dewan Trustee's) "powers" and "not valid". "But in view of the fact that the plaintiff could not succeed unless the gift" (of 1895) "was invalid the plaintiff is not entitled to any relief by declaring that the agreement" (of 1902) "is invalid".

3. "The suit is practically to set aside the deed of gift and agreement and Art. 91 of the Limitation Act" is "applicable" (Vide *Rajah Rajeswara Dorai v. Arunachalam Chettiar* ¹).

4. "There is no evidence on the plaintiff's side that the late Rajah continued to be under the influence of the 1st defendant after the deed of gift (June 1895) till the date of the deed of settlement (July 1895) under which he appointed Venkatrengaier as Dewan-Trustee for his son (the present plaintiff). "The limitation therefore began to run before the execution of the trust deed" (July 1895) "and no subsequent circumstance can interrupt the running of the limitation.

Besides the above four findings several other findings on mixed questions of law and fact were recorded by the lower court, but in the arguments before us on appeal, neither side advanced any argument on these questions or contested the lower Court's findings thereon. I need only say that I agree with the lower Court in its conclusions on these questions for the reasons given in its judgment.

I shall now take up the four findings dealt with before us one by one. The first question relates to the allegation of undue influence. The late Rajah was a person who by temperament

was immoderately extravagant. His education and bringing up only tended to increase his natural foibles. D. W. I says "the late Rajah was a very emotional person." Under the Roman Law he would be considered as a person permanently affected with incapacity to manage his affairs, solely on the ground of his immoderate extravagance not because he did not know the consequences of his actions or was at all weak of intellect. He was in perpetual need of the excitement of being praised for his reckless generosity and continuous liberty. Shrewd Nattukottai Chetties took advantage of his perpetual need of money even before he attained majority (which was on 3-11-1889) and lent him large sums depending upon his generous disposition to repay them several times over after he took possession of the estate and they were not at all disappointed. The late Rajah was much attached to the 1st defendant Kuppuswami Aiyar because the latter was a trusted servant of his mother for several years and he made the 1st defendant his own vernacular Secretary (Javapnavaez). But, the 1st defendant was in no better position to dominate the will of the Rajah than any other person who appealed to his generous instincts and love of pomp, show, display and fame. I do not think it will be going too far to say that the late Rajah's temperament was such that he courted opportunities for the display of his reckless generosity. I agree with the learned Subordinate Judge that the story of P. W. 8 that the 1st defendant related to the late Rajah that the late Rajah's mother appeared to the 1st defendant in a dream and told him "Ask my son and he will grant you all benefit" and that on telling this story the Rajah agreed to make the gift is a false story. On the contrary I believe the evidence of P. W. S. 1 and 2 who say that on the 2nd monthly ceremony after the Dowager Ranees's death, there was a religious gift of the village by the Rajah accompanied by the pouring of water through the right palm and that the gift deed was written a few days afterwards in consonance with the religious gift and this is corroborated by the recital in the gift deed.

Where a legacy bequeathed by a will is sought to be set aside on the ground of undue influence, it is not sufficient to prove that the legatee was in a position to exercise influence and it must also be proved that the influence was unduly exercised, the burden of proving this latter circumstance being on the party attacking the legacy. Again, as a legacy given.

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by a will takes effect only after the death of the testator, the testator does not deprive himself of the bequeathed property but deprives only his natural heirs. Hence also courts do not look with favour on attempts to attack bequests on the allegation of undue influence.

I admit that the case of a gift *inter vivos* stands on a less favourable footing. But it must be remembered in this case that the gift attacked was made on the 2nd June 1895 after the late Rajah had carried on his course of extravagance for more than 5½ years after he attained majority; after he had been advised before the end of 1894 by the Government to settle his estate upon his eldest son the present plaintiff (See paragraph 4 of the plaint) and just on the eve of the settlement-deed, Ex. IV, which was executed one month and 6 days after the gift deed. The gift now in question therefore stands almost in the position of a bequest. Now if *A* is said to be in a position to exercise undue influence over *B*, according to Indian Law (see S. 16 of the Contract Act) *A* must be in a position to dominate the will of *B*. If when in such a position of dominance, he uses it to obtain an unfair advantage over *B*, the transaction brought about by such use is voidable by *B*. Though the expression "dominate the will of another" is an expression of wide import and though I am aware that courts do not like to give exact and exhaustive definitions of undue influence any more than they like to give exact and exhaustive definition of fraud; I think the expression "undue influence" cannot be properly used unless either (1) confidence has been reposed on the person charged (*A* in our illustration) as where the latter is a solicitor, trustee guardian etc., or (2) unless the influence of the man *A* is such that *B* stands in some sort of respect, awe or fear of him such as a child towards its parent or a pupil towards a spiritual preceptor and so on, so that the idea of displeasing *A* by a refusal to submit to his wishes puts *B* in fear of a prospective injury to his secular or spiritual welfare and happiness. An ordinary servant and dependent like the 1st defendant could have had and is not proved to have had any such influence over the late Rajah and it is impossible to hold that the Rajah stood in awe or fear of the 1st defendant's displeasure. On the other hand, the letters, Exs. E to B, L and N show that the 1st defendant was a mere servile flatterer and dependant of the Rajah and not a person

in a position of authority to dominate the will of the Rajah. He was not in a position of trust and confidence such as a solicitor holds over his client. The numerous cases quoted where a father obtains a gift from his son who had just attained majority or a gosha lady makes a gift to the manager who manages all her affairs and who persuades her to believe that the gift made to him is only nominal or a solicitor obtains a gift from his client or a spiritual preceptor from his pupil or a person who is nominally a servant but has really made himself so indispensable to his master for the latter's comforts that the master has really become the servant's servant have all no relevancy in arriving at a conclusion on the facts of this case. From the evidence, I am clear that the 1st defendant's position towards the late Rajah was not such that the Rajah's volition could be overborne by or could be subjected to the domination of the 1st defendant's will. Undue influence and coercion were not clearly distinguished in the old English Law and though there is a well defined distinction now, the two are similar in this respect that their legal effect in making transactions voidable depends on the will of the person subjected to either being influenced to such a degree as to lose its freedom. I do not intend to quote many cases. The only Indian case which I need quote is *Ismail Mussajee Mookerdum v. Hafizboo* ¹ a passage from which is applied to the facts of this case by my learned brother in the judgment to be pronounced by him. There is an English case *Taylor v. Jhonstone*, ² which was a case not of bequest but of a gift inter vivos like the present. It was a case where a young woman of twenty made a gift to a relative with whom she had been residing from her father's death for a period of five months until her own death, and to whom she became greatly attached. It was held that the gift was not invalid. It cannot, in my opinion, be stated in this case that the 1st defendant stood in a fiduciary relation to the late Rajah on the date of the gift deed when the late Rajah was 27 years of age and the Raja's benefactions ranged over wide areas from the Sringeri Mattam in the Mysore Province to wealthy Nattukkottai Chettis and such a contention seems to me to be extravagant. In *Howes v. Bishop* ³ it was held that the doctrine of undue

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1. (1906) I. L. R. 33 Cal. 773

2. (1882) 19 Ch. D. 603.

3. (1909) 2 K. B. 390.

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influence could not be invoked in favour of a wife who was influenced by the fact that her husband wanted money and who therefore joined in executing a promissory note, though the jury found that her signature was procured by the influence of her husband. The case of *Nedby v. Nedby*¹, is also instructive. There a deed was prepared by the husband's solicitor and was executed by the wife in the presence of two of the clerks of the solicitor and it was not read over to her. The wife was agitated and distressed and she signed and agreed to sign in a reluctant manner and yet the Vice Chancellor refused to set aside the deed in the suit brought by her. There is no evidence at all in this case that the late Rajah executed the gift unwillingly or through fear of any unpleasant consequence if he refused to execute it or even that the 1st defendant made the late Rajah uncomfortable by excessive importunities. I therefore agree with the lower court that the gift deed of June 1895 is not vitiated by under influence. I may even go further and say that the plaintiff did not even allege that the older lease deed of 1894 (Ex. C for 40 years' term, was invalid and the term of 40 years mentioned therein not having expired the present suit for possession ought to have been summarily dismissed on that sole ground.

I shall now take up the second finding relating to the agreement of 1902. S. 36 of the Trusts Act says that the trustee may do all acts which are reasonable and proper for the protection or benefit of the trust property (subject of course to the restrictions contained in the instrument of trust). S. 43 of the Trusts Act says that a sole acting trustee authorized to execute the trusts and powers of the instrument of trusts may compromise, compound, abandon, submit to arbitration or otherwise settle any claim whatever relating to the trust. The Dewan-Trustee as the sole acting trustee was therefore empowered to compromise and compound the claim made by the 1st defendant under the gift deed which had been in force for nearly 7 years on the date of Ex. II. The late Rajah had not set it aside before the date of the settlement-deed. The late Rajah died in December 1903. The suit to set aside was *prima facie* clearly barred on the date of Ex. B and the Dewan-Trustee acted in my opinion very prudently in getting the 1st defendant to sign Ex. B agreeing to pay half the poruppu. I therefore disagree

1. (1852) 5 De G & Sm 377.

with the Lower court in its conclusion (for which it gives no reason in its judgment) that the 'compromise was beyond the powers of the trustee and was invalid (See as to powers of executors and trustees to compromise. *Houghton in re, Hawley v. Blake* ¹).

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Lastly, dealing with the question of limitation and assuming for the sake of argument that the gift deed Ex. I was brought about by undue influence, Article 91 of the Limitation Act clearly applies to this suit as the plaintiff cannot obtain possession without setting aside the gift deed which is not a void transaction but only voidable. See *Janki Kunnwar v. Ajit Singh* ². The limitation period is three years from when the facts entitling the person to have the instrument cancelled or set aside becomes known to him. Now the late Rajah who executed the instrument knew the facts perfectly from the very date of execution and hence the cause of action arose at once in June 1895. I need not say that when once time begins to run it does not cease to run, except under very peculiar circumstances which do not exist in this case. In June 1898, the gift deed became unavoidable thereafter through the expiry of three years' limitation period. I do not deny that undue influence might be set up as a defence by a donor to the suit brought by the donee for possession even after the period of limitation but that is not the case here.

It was argued by Mr. S. Srinivasa Aiyangar that the cause of action arises only when the undue influence ceases. I considered this question in a case brought by the present plaintiff himself. *Raja Rajeswara Dorai v. Arunachalam Chettiar* ³ and expressed the opinion that the cessation of undue influence has no relevancy on the question of limitation unless of course, it could be brought under the heading of fraud so as to attract the operation of S. 18 of the Limitation Act. It was however argued that in *Sri Krishan Lal. v. Mussamat Kashmiro* ⁴ their Lordships of the Privy Council expressed such an opinion. I do not think there is anything in that case which supports the contention of Mr. Srinivasa Iyengar. The facts there were very peculiar. A single sentence in the judgment at page 374 is relied on, namely that time would not

1. L. R. 1904 1 Ch. 622.

2. (1887) 1 L. R. 15 Cal. 58

3. (1913) 1 L. R. 38 M. 321 : 24 M. L. J. 592.

4. (1916) 31 M. L. J. 364.

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under the circumstances of that particular case begin to run against a widow (defendant) even if she had to bring a suit to set aside the disputed transaction till her husband's brother's influence ceased at his death. She has executed an arbitration agreement under the undue influence of her husband's brother and she set up the undue influence and succeeded. But as a mere obiter dictum, their Lordships of the Privy Council said that even if she had sued as plaintiff, she would not be barred. The facts were very peculiar and their Lordships found that there was fraud practised upon her, and that she did not have full knowledge of the facts and the rights arising out of these facts till her husband's brother died. Thus even that *obiter dictum* was passed, not on the ground that the death of the husband's brother and the cessation of his influence was the date for the *terminus adquo* of the cause of action under the law but that it was on the ceasing of the undue influence that the real state of facts entitling the widow to have the instrument cancelled became known to her. (Though the third column of Art. 91 uses the word "plaintiff" that word "plaintiff" includes his predecessor. See definition given in S. 2 of the Limitation Act). Therefore time began to run in this case as soon as the facts were known to the late Rajah. The suit is again hopelessly barred even if we take the date of the knowledge of the Dewan-Trustee or any of his successors as the date of the cause of action. In this connection I wish to express with great respect my dissent from the decision in 2 Nagpore L. R. 98 which has been relied on by Rustomji and Mitra (the former at page 327 of his book and the latter at page 1003 of his book.) in their valuable treatises on Limitation that the onus of proof is on the defendant to prove that the plaintiff's knowledge arose more than 3 years before suit. The analogy of a defendant relying on Article 127 of the Limitation Act against the claim of an undivided coparcener for partition which analogy was relied on by Mr. Srinivasa Iyengar is, in my opinion, entirely irrelevant and misleading. There is not a tittle of evidence that either the Dewan-Trustee, Mr. Venkata Rangaiyer, a very capable retired Judicial Officer who was the trustee for 11 years till September 1906 or Mr. Varadaraja Sarma (Deputy Collector) who was the Dewan-Trustee after him till May 1908 or Mr. Kista Rao who was the Dewan-Trustee till April 1910 was ever

subjected to any undue influence. In the result I agree with the lower Court that the suit is barred.

A very ingenious argument was finally put forward, namely that the 40 years lease deed Ex. C of 1894, was superseded by the registered gift deed of June 1895, that this gift deed in its turn was superseded by the compromise agreement of 1902 and that if the plaintiff is able to set aside this compromise deed of 1902 he is entitled to possession as the earlier two deeds had been superseded once for all each earlier having been superseded by its successor beyond resurrection. I have already found that the compromise deed of 1902 is a valid deed. But even assuming that it is invalid, I cannot accept the argument that the defendant who is trying to protect his possessory rights cannot fall back upon his earlier title deeds if the latter title deed which was intended to supersede the earlier title deed was found to be invalid or was invalidated.

I am clear that if the compromise deed is set aside, the parties are clearly remitted to their original rights as they stood before the compromise. The effect of setting aside a compromise brought about by fraud and collusion was considered by their Lordships of the Privy Council in *Khajoorunnissa v. Rowshan Jehan* ¹, and differing from the Calcutta High Court. Their Lordships say that all rights which were attempted to be settled by the compromise were revived on both sides when the compromise was set aside. A similar question was considered by Mookerjee, J. in *Surjiram Marwari v. Barhamdeo Persad* ² where he holds that if a mortgage right was intended to be merged in a conveyance and the conveyance proved ineffectual, the right under the mortgage revived. In *Harchandi Lal v. Sheoraj Singh* ³ a mortgagee sued to enforce his mortgage of 1876, though he had accepted two later deeds of 1887 in satisfaction of his mortgage and even though he had handed over the document of 1876 to the mortgagor. It was argued in defence that the mortgage of 1876 was destroyed by the two deeds of 1887 and could not be revived. Their Lordships however say : "But the original intention of the mortgagee was entirely frustrated by the fact that two deeds were held not to be binding on Mussammatt Nandan and it does not appear to Their Lordships to be consistent with

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1. (1876) I. L. R. 2 Cal. 184 at page 196. 2. (1904) 1 C. L. J. 337 at page 343.

3. (1916) I. L. R. 39 ALL. 179.

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equity or good conscience that the first three defendants, having successfully maintained that the transaction embodied in the deeds of 1887 was not binding on them as heirs of Jai Chand, should now claim the benefit of such transactions as release of the mortgage of the 13th. of November 1876. Thus their Lordships held in the above case that even defendants could not plead against the revival of a former deed when the later deeds intended to supersede it were invalidated at their instance. *A fortiori*, it is clear that a plaintiff could not invalidate a compromise deed and yet contend that the rights under the gift deed which were intended to be superseded by the compromise deed could not be revived even as a shield by the defendants. In fact, the matter seems to me to be unarguable.

In the result I would dismiss the appeal with costs. We certify 2 vakils for each side.

Spencer, J.

Spencer, J.—This suit was instituted by the Rajah of Ramnad to recover possession of the village of Nedunthulasi which was gifted away by his father the late Rajah by a permanent rent-free gift deed dated June 2nd, 1895, to the 1st defendant. It is alleged in the plaint that the 1st defendant in his capacity of Javab Navis (private secretary) to the Rajah exercised undue influence over his master, a man of weak will, to obtain this and other benefits for himself. About a month after this gift the late Rajah entered into an arrangement on July 12th, 1895 (Exhibit IV) by which he handed over his estate upon trust to be managed by a pensioned Subordinate Judge named Rao Bahadur Venkataranga Ayyar (styled a Dewan Trustee) with one co-adjutor Mr. Chentsal Rao, C.I.E., and with a committee of three, consisting of himself and two distinguished legal practitioners who had power to remove the trustee or the co-adjutor and to fill their places when they became vacant. The estate was to be thus managed till the present Rajah attained the age of 21, which happened on June 3rd, 1910, within 3 years before the filing of the plaint in this suit.

On April 24th, 1902 the said Dewan Trustee together with the two lessees of the Ramnad Estate entered into an amicable arrangement of compromise (Exhibit II) with the 1st defendant whereby he was to continue to enjoy the village of Nedunthulasi hereditarily and in perpetuity, but instead of its being rent free, he was to pay a poruppu or quit-rent of Rs. 402-1-10

annually which amounted to a moiety of the sarasari or average rent of Rs. 804-3-7. The present suit, whether its object be to set aside the gift deed of 1895 or the settlement of 1902 is hopelessly time-barred under Art. 91 of the Limitation Act.

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Mr. Srinivasa Iyengar argued that the later transaction having superseded the earlier gift, the plaintiff need not sue to set aside the gift but he could within 3 years of attaining majority repudiate the acts of his trustee if they were improvident and injurious to his interests.

When this case came before a Bench of this High Court on a previous occasion, the learned Chief Justice and Seshagiri Aiyar, J. sent it back for fresh consideration and for further evidence on the questions whether the undue influence, to which the Rajah was alleged to have been subjected, continued to affect the succeeding trustee as was alleged in paragraph 22 of the plaint, and whether the transfer (Exhibit II) was inconsistent with the duties of the trustee.

The Subordinate Judge has now found that "there is no evidence much less any allegation that the succeeding trustees were subject to any undue influence"; he also observed that it was "difficult to hold that the suit was in time in view of the fact that there was no evidence or even any allegation that the late Rajah continued to be under the undue influence of the 1st defendant for 8 years after the gift till he died in 1903".

Accordingly it is not now contended in appeal that the trustee, Venkataranga Aiyar, was under undue influence. It is only argued that his act in confirming the Rajah's grant though with the modification that quit-rent was to be paid, was an improvident act and in excess of his powers as he should have sued to have the gift set aside if he had realised his responsibilities and if he had been aware of the facts which would have enabled him to succeed in such a suit.

Now Rao Bahadur Venkata Ranga Iyer had been given facility for obtaining the advice of that distinguished Hindu gentleman of unquestioned probity, Mr. Chentsal Rao, C. I. E., on all important matters connected with his trust. I am of opinion that he may have realised the difficulty of establishing in a Court of law that the Rajah was actuated by undue influence when he made the gift of this village, and the further difficulty of proving that that influence, prevailed so long as to excuse the failure of

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those in whom the management of the estate vested for 3 years after 1895 to make any attempt to revoke the gift. In 1902 he may have *bona fide* considered that half a loaf was better than no bread and that therefore in the best interests of the minor he was well advised to save at least Rs. 402 a year out of the village in view of the improbability of a suit to recover the whole village in tact being successful. It was thus a compromise of doubtful claim. He was acting within his powers under S. 43 of the Trusts Act, read with the proviso to the section which relates to sole trustee and with clause 22 of the deed of trust. The meaning of the words "sole acting trustee" occurring in S. 43 of the Indian Trusts Act becomes clear from a reference to S. 21 of the English Trustee Act of 1893. If the instrument creating the trust authorises a sole trustee to execute the trusts and powers thereof, he is termed a sole acting trustee when he enters into an agreement of composition or other arrangement.

But it is argued that the deed of gift of 1895 bears on its face traces of undue influence because it contains false statements (1) that the village was only worth Rs. 7,000 whereas it is on the statement of D. W. 1 now worth about Rs. 30,000 and must have then been worth Rs. 20,000, (2) that the Rajah was acting in deference to his mother's wishes though she had died 2 months before, and (3) that the donee had been working for 12 years without any salary. It is further argued that under S. 16 (3) of the Indian Contract Act the burden of proving that the gift to 1st defendant was not induced by undue influence lay on the defendant.

The case of *Bridgeman v. Green*¹ is cited as an instance of undue influence exercised by a servant over his master. The circumstances of that case were exceptional. Conveyances which reported to have been made for valuable consideration were held to be not supportable even as gifts when their execution was obtained by fraud and undue influence. There is no presumption that all servants wield such influence, as Green wielded over their masters, or that all masters are so weak-willed as Mr. Bridgeman. The evidence in the present case tends to show that the late Rajah was emotional and "generous to a fault" but not of weak intellect or irresponsible for his actions. It has not been proved that the 1st defendant

was in a position to dominate the will of the Rajah or that the transaction was an unconscionable one. The 1st defendant already had a lease for this village for which he had to pay a poruppu of Rs. 800 and odd. The statement in the gift deed that the Rajah's mother wished to confer some benefit on the 1st defendant for his services is not shown to be false, and the fact that the occasion was that of the mother's second masigam makes it probable that the Rajah was actuated by pious feelings evoked by his mother's memory when he made the gift. To adopt the words of Sir Arthur Wilson when delivering the judgment of the Privy Council in *Ismail Mussajee Mookerdam v. Hafiz Boo*¹ but substituting the words 'servant' for 'daughter' and 'master' for 'mother' the circumstances of this gift may well be summed up in these words :

"The mere relation of servant to master of course in itself suggests nothing in the way of special influence or control. The evidence seems quite insufficient to establish any general case of domination on the part of the servant and subjection of the master such as to lead to a presumption against any transaction between the two. With regard to the actual transactions in question there is no evidence whatever of undue influence brought to bear upon them." Now looking at the facts of this transaction in the same light as they have been presented at the trial of this suit, the Dewan. Trustee with his Co-adjutor having the resigned Rajah with his committee of lawyers behind them may well have doubted the practicability of getting a Court of Justice to undo what had been done and so they may have allowed the claim to become barred by time and finally to have made the best terms possible out of a bad case. The result of that settlement is Exhibit II in which it is recited that the trustee and the lessees in consideration of the cost, trouble and inconvenience that both parties might be put to if proceedings were instituted in Court in respect of the deed of June 2nd, 1895 as well as of the uncertainty of the result of litigation and of other facts, had decided to have the dispute settled amicably and had entered into the arrangement detailed therein.

That arrangement in my opinion cannot now be legally set aside even if the plaintiff could now succeed in setting it aside, his position would be worse as he would then be

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1. I. L. R. 33 Cal. 773.

confronted with the more formidable obstacle of the absolute gift by his father to 1st defendant. His suit to set aside that gift is long out of time. The Appeal fails and is dismissed with costs.

Appeal dismissed.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE RAMESAM.

Mysore Kopniah Sivananjah

and others

... *Appellants * (Defendants Nos. 1 to 3) Defendants 2 and 3 are the counterpetitioners.*

v.

K. Sithay Goudar and

another

... *Respondents (Petitioner purchaser and Plaintiff.*

Sivananjah
v.
Sithay
Goudar

Transfer of Property Act, Ss. 63 and 70—Mortgage—Accretion—Acquisitions after passing of decree on mortgage, if pass to the auction purchaser—Possessory title—User.

Ss 63 and 70 of the Transfer of Property Act must be read together and under both sections the accession to the mortgaged property must be received during the continuance of the mortgage, if it is to form part of the mortgaged property.

Where acquisitions are made by a mortgagor after a decree for sale has been passed and the mortgaged property sold in execution there is no equity in favour either of the mortgagee or of the purchaser at the court auction to have such acquisitions taken away from the person who paid for them and attached to the property already sold under the decree. For, at the time they were acquired, the mortgage interest had ceased to exist.

A mere user which has not ripened by prescription would not give rise to any right upon which an action could be founded unless some kind of possessory title existed in the plaintiff's favour.

Appeal against the Order of the Court of the Subordinate Judge of the Nilgiris at Octacamund in C. M. P. No. 402 of 1919 (C. M. P. No. 367 of 1919 in O. S. No. 102 of 1917), dated the 22nd March 1920.

S. T. Srinivasagopalachari for appellant.

Messrs King and Patridge for respondents.

The Court delivered the following

Spencer, J.

Judgments :—*Spencer, J.*—At a Court sale upon a mortgage decree the 1st respondent purchased *inter alia* a plot of land measuring 7 cents in extent denoted by the Survey Number H (61) situated in Manjanacorai “together with the buildings and

erections thereon and the fixtures thereon and together with all the blüegum trees and other trees thereon."

The judgment-debtor's house stands on H. 61 and this passed to 1st respondent by the sale. In front of the house there are two plots which were not sold at the court sale. One is 56 A-3 on which the verandah and two projecting wings of the judgment debtor's house have been built, and the other is H 58-3 which serves as an approach to the house from the public road.

When the purchaser (1st respondent) took delivery of the house, he was obstructed by the judgment-debtors (who are appellants in the High Court from obtaining possession of the two other plots. So he successfully took proceedings under O. 21, R. 97 in the Subordinate Judge's Court, Ootacamund, to remove the obstruction. As the obstructors were the judgment debtors, S. 47, Civil Procedure Code, applies and they have appealed under S. 96 from the Subordinate Judge's order.

The learned Subordinate Judge was in my opinion perfectly right in holding that the property in 56 A-3 and H 58-3 did not pass at the sale to the purchaser of H. 61.

It is immaterial to consider whether these plots would have passed as "appurtenances to the premises" if the words "firstly and secondly described" which qualified the word "appurtenances" in the mortgage deed had not been omitted (probably through the carelessness of some clerk in the Sub Court) from the decree and the sale proclamation, because there can be no doubt that according to the sale proclamation and the sale certificate the appurtenances to the premises at Manjanacorai were neither advertised for sale nor sold.

The Subordinate Judge held that the two disputed plots were accessions to plot H. 61 and that they should be deemed to have been sold in consequence of the provisions of S. 70 of the Transfer of Property Act. Ss. 63 and 70 of the Transfer of Property Act must be read together. They involve the principle of Roman Law that accessions go with the principal and apply it to mortgaged property. The illustrations to S. 70 give instances of increase by alluvium and of building on the soil of another. Under S. 63 accession to mortgaged property must be received during the continuance of the mortgage for the application of this principle and under S. 70 it must be the

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same. Although the words of that section only make it necessary that the accession should be after the date of the mortgage, it must also be understood that it is before the mortgage becomes extinguished.

The present is not a true case of accession. There is here neither accession by natural increment nor accession in favour of one of two owners. The plots in dispute were the property of the Government. Neither the mortgagors nor the mortgagee had any right in them before the judgment-debtors acquired them by purchase from Government on a date subsequent to the date of the Court sale at which the 1st respondent purchased. Survey No. H. 61. (Compare *Kodi Sankara-Bhattar v. Moidin* ¹.)

The case of *Surya Narayan Mandal v. Nanda Lal Sinha* ² which the Subordinate Judge incorrectly thought to be on all fours with the present case, was an instance of the merger of two interests, the Shikmi interest and the mokarari interest in the same land (chuck). The sale took place in 1902 after the merger had been effected by the purchaser in 1886 by one of the mortgagors of the mokarari interest in execution of a decree obtained against the holders of the mokarari tenure. Thus it was a clear case of accession. In the case before us there are not two interests in the same land, but two different lands.

How far acquisitions made by a mortgagee enure for the benefit of his mortgagor is a question which has been fully considered under the law in force previous to the passing of the Transfer of Property Act in the Privy Council case of *Raja Kishendatt Ram v. Raja Mumtaz Ali Khan* ³ in which reference is made to the English cases of *Rakestrew v. Brewer* ⁴ and *Doe v. Pott*. ⁵ the first of which dealt with an accretion to a mortgage of renewal of the term and the second dealt with the accretion to a mortgage of certain copyholds purchased by the mortgagors during the continuance of the mortgage. In *Raja Kishendatt Ram v. Rajah Mumtaz Ali Khan* ³ certain subordinate proprietary rights which the mortgagee acquired by purchase during the continuance of the mortgage and allowed to merge in the principle property

1. (1918) 8 L. W. 100.

2. (1906) I. L. R. 33 C. 1212.

3. (1879) I. L. R. 5 Cal. 198.

4. Mosely 189.

5. 2 Dough. 710.

prior to redemption were held to enure for the benefit of the mortgagor on redemption.

Where acquisitions are made by a mortgagor after the decree for sale has been passed and after the mortgaged property has been sold, there is no equity in favour either of the mortgagee or of the purchaser at Court auction to have such acquisitions taken away from the person who paid for them and attached to the property already sold under the decree. For at the time they were acquired the mortgage interest had ceased to exist.

The 1st respondent's counsel has tried to make out a new case that these are easements either for necessity or in the course of perfection by prescription. A mere user which had not ripened by prescription (in this case by 60 years' enjoyment against Government) would not give rise to any right upon which an action could be founded. See *Narasappayya v. Ganapathi Rao* ¹, unless some kind of possessory title, as was the case in *Kandapa Rajam Naidu v. Devarakhonda Surya Narayana* ², existed in the plaintiff's favour. At the date of the 1st respondent's purchase, the appellants whose rights he purchased could not have maintained a suit against Government to establish their easement rights over the soil of 56-A-3 and H 58-3 and therefore no easement rights become vested in the purchaser in consequence of the sale. The only right that the mortgagors then possessed was the right to the soil of H. 61 and the building thereon and fixtures, which will include the two projecting wings of the house, but not the ground on which they stand.

The appeal must therefore be allowed and the petition dismissed with costs of appellants against 1st respondent here and in the Court below.

Ramesam, J. I agree.

A. V. V.

Appeal allowed.

Ramesam, J.

1. (1918) 1. I. L. R. 38 Madras 280.

2. (1910) 1. L. R. 34 Mad. 173.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR JOHN WALLIS, CHIEF JUSTICE AND MR. JUSTICE KRISHNAN.

Ullattuthedi Choyi ... *Appellant* + (3rd deflt.)
v.

The Secretary of State for India in
Council (through the Collector of
Malabar) ... *Respondent* (Plaintiff.)

Ullattuthedi
Choyi
v,
Secretary of
State for
India.

Crown Grants Act, S. 3—Grant by Crown—Determination of tenancy on six months' notice.

Where under the terms of a lease granted by the Crown the lessee agrees to surrender the demised property on six months' notice, he cannot resist a suit in ejectment by the Crown after the requisite notice, on the ground that he must be paid the value of his improvements under the Malabar Compensation for Tenant's Improvements Act, *Kalliyal Moosa v. Secretary of State* (1) Ref.

Second appeal against the decree of the District Court of South Malabar in A. S. No. 330 of 1919 preferred, against the decree of the Court of the Additional District Munsif of Calicut in O. S. No. 203 of 1917.

A. Krishnaswami Aiyar and K. P. Ramakrishna Aiyar for appellant.

The Government Pleader for the respondent.

The Court delivered the following

Judgment :—This is an appeal from the appellate judgment of the District Judge of Calicut reversing the judgment of the District Munsif and granting the plaintiff the Government a decree for ejectment without payment for improvements instead of a decree for ejecting defendant on payment for improvements.

The District Judge has held that the lease sued on is a Crown grant within the meaning of the Crown Grants Act and in that conclusion, in our opinion, he was right. Under S. 3 of the Crown Grants Act of 1895 the grant is to "take effect according to its tenor any rule of law, statute or enactment of the legislature to the contrary notwithstanding." In our opinion it is not possible to have clearer words than these. The grant in question contains a reservation of the right to terminate the tenancy on six months' notice, and there is an express covenant by the lessee to surrender. It is now said that he cannot be evicted until he has received compensation under the

provisions of the Malabar Compensation for Tenants Improvements Act. To allow such a provision of that Act to take effect would prevent the Crown grant in question from taking effect according to its tenor. We entirely agree with the decision on this point in *Kalliyal Moosa Kutti v. The Secretary of State*¹ and deem it unnecessary to repeat the reasons which are given for that decision.

The appeal fails and is dismissed with costs.

A. V. V.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SADASIVA AIYAR AND MR. JUSTICE SPENCER.

Honourable the Rajah of Ramnad
(through his authorised Dewan
Rao Sahib S. Thirumalai
Ayyangar)

... *Appellant* * (*Defendant.*)

v.

Gnanamuthu Bothagar

... *Respondent* (*Plaintiff.*)

Madrās Estates Land Act, S. 13 (3)—Rent—Vanpayir rate—Implied Contract to pay—Onus and Quantum of proof—Improvements at tenants sole expense—Vanpayir crops raised with aid of—Vanpayir rent—Charge of—Legality—Conditions.

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Where, in a case in which a landlord charged plaintiff, his ryot with the Vanpayir rate on the ground that Vanpayir crops were cultivated by him in Fasli 1323 (1913-14) with the aid of a well excavated by him in 1912-13 at his own expense, the evidence for the landlord was to the effect that there was an immemorial practice in the suit estate to charge Vanpayir rates, but did not show what were the circumstances under which other tenants of the estate paid such rates, whether there were any improvements on their lands, whether such improvements were made by the ryots or by the landlord, and whether they voluntarily paid those rates or paid them in consideration of some concession made by the landlord to them, while it was admitted that the plaintiff had never raised a Vanpayir crop before Fasli 1323, that he had no other land in the estate, and that Vanpayir crops could not be cultivated without the aid of wells held, that the facts and circumstances of the case were not such as to compel the courts to find an implied contract to pay Vanpayir rates and that the courts below did not commit an error of law in refusing to find such a contract.

Per *Sadasiva Aiyar, J.*—The Court is not bound to presume an agreement and consideration for payment of higher rent by reason of a mere usage established by long continued payment thereof.

Second Appeal against the Deeree of the Court of the District Judge of Ramnad, at Madura, in appeal Suit No. 837 of 1918, dated the 13th March 1919, preferred against the

* S. A. No. 931 of 1919.

8th April 1921.

1. (1919) I. L. R. 43 Mad. 65.

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Decree of the Court of the Special Deputy Collector of Ramnad in Summary Suit No. 4406 of 1915.

L. A. Govindaraghava Aiyar and *S. Sundararaja Aiyangar* for appellant.

A. Venkatrayaliah, *L. Venkatanarasiah* and *V. K. Mahadeva Sastri* for respondent.

The Court delivered the following

Sadasiva
Iyer, J.

Judgment:—*Sadasiva Iyer, J.* :—The defendant (the Raja of Ramnad) who is a landholder under the Estates Land Act is the appellant before us. The plaintiff is a ryot under him and for Fasli 1323, i. e., 1913-14, the defendant tendered a patta to the plaintiff in which he charged the plaintiff with a higher rent than the rent which the plaintiff had been till then paying for the land in his holding on the ground that Vanpayir crops were cultivated in that fasli for the first time with the help of a well which the plaintiff excavated in the land at an expense of Rs. 600 in 1912-13 after the Estates Land Act came into force. As the plaintiff paid only the usual dry rate and refused to pay the difference between the Vanpayir rate and the dry rate the defendant attached the lands. Hence the plaintiff brought the suit in the Collector's Court for raising the attachment as illegal contending that he was not bound to pay a higher rate for raising the Vanpayir crops as the improvements were effected at his own expense after the passing of the Estates Land Act, and as there never existed any contract to pay such a higher rate of rent. Both the lower courts, as I understand their judgments, held (1) that there was no usage proved to pay the higher rent claimed and (2) that no contract express or implied to pay it has been proved and (3) that so far as the alleged usage is concerned, S. 13 (3) of the Estates Land Act precluded such usage being relied on for claiming a higher rate of rent. They did not go into the question whether, if a contract before the passing of the Act was proved, higher rent could be claimed even after the passing of the Estates Land Act notwithstanding S. 13 (3), nor did they consider the question whether, even if S. 13 (3) did not apply retrospectively to the case of a contract made before the Act came into force where the improvements also had been made before the Act came into force, that section may not apply in the case where the improvements were effected after the Act came into force though the contract was before the Act.

Several decisions alleged to bear on the question in dispute were quoted before us. But most of them were decided with reference to the provisions of Act 8 of 1865, I do not think it necessary to refer to most of them. The question whether retrospective effect should be given to S. 13 (3) was considered by myself and Napier, J in *Venkata Perumal Raja v. Ramudu* 1. Owing to the difference of opinion between us on it, the case went before Mr. Justice Kumaraswami Sastri. I gave my opinion definitely that after the passing of the Estates Land Act a landlord cannot claim enhanced rent on account of the increased outturn of the crops due to the improvements made by the ryot (1) whether the improvements were made before or after the passing of the Act (2) whether or not there was a contract to the contrary and (3) whether such contract was made before or after the passing of the Act. In the opinion pronounced by Mr. Justice Kumaraswami Sastri which prevailed ultimately, it is stated in one place : "Clauses 1 and 2 to the section, *i.e.*, S. 13, can only refer to improvements to be effected in future and if the legislature intended clause 3 to be retrospective it would have given some indication of such intention. On the contrary the use of the words "shall not by reason of making an improvement become liable" indicate that only future improvements are intended." If this passage alone is taken from the learned Judge's opinion, it might be plausibly argued that he held that where the improvements were effected after the Act came into force, S. 13 (3) would prevent the claiming of a higher rent in respect of such lands on account of increased or more valuable crops through future improvements even if the contract to pay a higher rate had been made before the Act. But at page 95, the learned Judge proceeded to state : "I am of opinion that the words "contract to the contrary" refer only to contracts made after the passing of the Act and that S. 13 (3) has no retrospective operation in cases where rent claimed was payable under a contract which would have been legally enforceable under the Rent Recovery Act or any other law in force at the time of the passing of the Estates Land Act." I therefore take it that the learned Judge intended that even in cases where the improvements were made after the passing of the Act if there was a contract before the passing of

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1, (1915) I. L. R. 39 M. 84, 28 M. L. J. 81.

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the Act enhanced rent could be claimed under it and that contract would not be affected by S. 13 (3).

Mr. L. A. Govindaragava Aiyar for the appellant therefore strenuously contended that the contract found against by both the lower courts ought to have been found by both the courts as existing. He argued alternatively that, at any rate, in deciding against the existence of such a contract, they misdirected themselves on some questions of law and hence their finding should not be accepted and that we should call for a fresh finding.

... That no express contract has been proved could not be controverted. Mr. L.A. Govindaragava Iyer argued that the lower courts should have found an usage existing immemorially for payment of such enhanced rent if Vanpayir crops are raised by a ryot in this village, that they should have presumed from such usage and from the fact that rents were originally fixed on a varam basis that when such rents were commuted to money rates (though we do not know when they were so commuted), there was a contract made between the landlord and all the tenants in the village including the plaintiff's predecessor in title to pay enhanced rent for Vanpayir crops raised and that the lower courts misdirected themselves in not giving sufficient weight to the usage and in not drawing such an inference. This usage was spoken to by the single witness (Karnam) examined on the defendant's side. He also produced certain Jamabandi accounts signed by two deceased persons which contained entries of payments of higher rents by other tenants between 1897 and 1906. I shall assume that the lower courts would have acted more reasonably if they had found on the evidence a usage for the ryots to pay such enhanced rent for Vanpayir. (I do not express any opinion about it). Still I cannot say that unreasonably refusing to find the existence of such a usage, they committed any error of law. Again even if such usage was proved, the question whether they were bound to imply any such contract between the plaintiff's predecessor in title and the then landholder is also not free from difficulty. In *Periyakaruppa Mukkandan v. Raja Rejeswara Sethupathi*¹ deceased by a Full Bench of 5 Judges (Ayling, J. and Seshagiri Iyer, J. dissenting) the learned Judges who dissented held that as regards a contract to pay higher rate, legal origin and

1. (1919) I. L. R. 42 Mad. 475. (F. B)

consideration therefore need not be presumed by courts merely from long continued payment of higher rents, while the majority held that it was open to the court to presume both an agreement as legal origin and the consideration therefor turning that agreement into a contract. Thus even according to the opinion of the majority of the Judges, the court is not bound to presume an agreement and consideration for payment of higher rent by reason of mere usage established by long continued payment thereof. In the present case, the lower courts have refused to find that there was an implied agreement supported by consideration on the evidence adduced and I am unable to say that the facts and circumstances are such that they were legally bound to have found an implied contract on those facts and circumstances. The Second Appeal therefore fails and should be dismissed with costs.

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Sadasiva
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Spencer, J. :— It was strenuously argued by the appellant's vakil that the lower courts ought to have found the existence of a contract between the tenant and the Rajah at the time of the commutation of the varam rents into money rents to pay garden or vanpayir rates irrespective of improvements made or to be made by the ryots. It is true that in Paragraphs 3 and 5 of the written statement, the defendant did allege that the varam system was converted into money rent system for the benefit of the ryots and that there was an agreement to pay rent at different rates according to the crops raised, the consideration for the same being the landlord's consent to collect only a small money rent instead of varam or division of produce which was more profitable. The lower courts have referred to the evidence of the 1st Defence witness and to the jamabandi accounts, and the District Judge says "they do not prove anything but the fact that Vanapayir was being levied in respect of other lands in the village" and "there is no other evidence in support of the defendant's claim." It is now argued that the practice of paying Vanpayir spoken to by D. W. 1. should have been referred to a legal origin namely, an agreement to pay such rates at the time of conversion into money rates. But this witness only stated that as far as he knew there was a practice prevalent from the beginning of the Samasthanam to charge Vanpayir rates. There is no means of knowing from this witness's brief statement and from the figures in the jamabandi accounts what were the circumstances under which

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other tenants paid such rates, whether there were any improvements on their lands, whether such improvements were made by the ryots or by the landlords, and whether they voluntarily paid these rates or paid them in consideration of some concession made by the landlord to them. The witness said in cross-examination that the plaintiff had never raised a vanpayir crop before fasli 1323, that is, the fasli in suit to that he had no other land and that vanpayir crops could not be cultivated without the aid of wells. In order to understand whether there was an implied contract to be deduced from a custom to pay vanpayir rates, it would be necessary to know whether there were wells on the lands upon which such rates were paid and when the wells were constructed. In *Gopalasami Chettiar v. Fischer* ¹ the subject of accepting a custom as proof of the existence of a contract was dealt with in these words "It may be that a contract may in certain circumstances be inferred on proof of a general custom affecting the holding of an estate." It was also observed lower down: "Each tenant's contract, if any, is to be inferred from his own acts and payments rather than from those of other tenants." The High Court in that case finally declined to accept evidence that a number of tenants had paid tree-tax at various rates and in different ways as proof of a contract that every tenant should pay tree-tax at the various rates claimed by the landlord in the particular case. In *Arunugam Chetty v. Raja Jagaveerra Rama Venkateswara Ettappa* ² there was a finding by the District Judge that the agreements to pay enhanced rent were not void for want of consideration but the learned Judges declined to uphold his finding as there was no evidence to support it. When the case went on appeal to the Privy Council their Lordships held in *Raja Jageveerra Rama Venkateswara Ettappa v. Arunugam Chetty* ³ that, in the absence of any consideration for a new promise to pay at a higher rate of 8 fanams a kuli, for land which was previously held at 4 fanams a kuli, no implied contract could be inferred.

The facts of this case are somewhat similar to those of *Gopalasami Chettiar v. Fischer* ¹ The lower Courts found no evidence in support of the defendant's claim, and I agree with my learned brother that it is not necessary to call for a fresh

1. (1904) I. L. R. 28 Mad. 328.

2. (1910) I. L. R. 35 Mad. 134.

3. (1911) I. L. R. 43 Mad. 174. 36 M. L. J. 49.

finding, seeing that the learned District Judge has thoroughly considered the effect of the evidence on the record from the proper stand point. The Second Appeal should be dismissed with costs.

C. A. S.

Second Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE KRISHNAN AND MR. JUSTICE ODGERS.

Sinnanan Chetty

... Appellants * (Plaintiff).

v.

Sivakami Ammal and another ... Respondents (Defendants.)

Limitation Act, arts. 144 and 148—Mortgage—One of several co-mortgagors, redemption by—Suit by another for recovery of possession on payment of his share of the redemption amount—Article of the Limitation Act applicable.

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Where one of several mortgagors redeems the whole mortgage and obtains possession, a suit against him by another co-mortgagor to recover his share of the property mortgaged on payment of his share of the expenses of redemption is not governed by Article 148 of the Limitation Act, as the suit is not one to redeem a mortgage but one to recover possession of property on payment of the charge created by S. 95 of the Transfer of property Act. *Vasudev v. Balaji* (1), *Munia Gounden v. Ramaswami Chetty* (2) and *Chandra Pal v. Barada Prosanna Bhattacharaya* (3) followed. *Ashfaq Ahmad v. Wazir Ali* (4) not followed.

Such a suit is governed by Article 144 of the Limitation Act.

Second Appeal against the decree of the Court of the District Judge, Madura in A. S. No. 415 of 1919 preferred against the decree of the Court of the District Munsif of Tirumangalam in Ordinary Suit No. 431 of 1918.

C. S. Venkatachari for appellant.

M. S. Vaidyanatha Aiyar for respondents.

The Court delivered the following

Judgment:—This case has been argued before us by both sides on the footing that it is a case of a co-mortgagor redeeming the whole mortgage and remaining in possession thereof and the other co-mortgagor bringing a suit to recover his share of the mortgaged property on payment of his share of the mortgage debt there being no other expenses of redemption. We are therefore relieved from considering whether that is the correct position on the facts of the case.

* S. 1374 of 1920.

11th August, 1921.

1. (1902) I. L. R. 26 Bom. 500, 2. (1918) I. L. R. 41 Mad. 650; 34 M. L. J. 528,

3. (1918) I. L. R. 46 Cal. 111, 4. (1889) I. L. R. 14 All. 1.

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Ammal.

Taking the case then as one by a mortgagor to recover from his co-mortgagor his share of the property mortgaged on payment of his share of the expenses of redemption it is clearly a case which falls under S. 95 of the Transfer of Property Act. That section gives a charge to the redeeming mortgagor against his co-mortgagor and nothing more.

The question that has been raised here for decision is one of limitation. Appellant wants us to apply Art. 148 to this suit but we think it is not possible on its wording to apply that article as this is not a suit to redeem a mortgage but one to recover possession of property on payment of the charge created by S. 95. This is the view taken in *Vasudev v. Balaji*¹ which has been adopted in *Munia Gounden v. Ramasami Chetty*² and *Purna Chandrapal v. Barada Prosanna Bhattacharya*³. It is true the Allahabad Court has taken a different view in *Ashfaq Ahmad v. Wazir Ali*⁴ but even in that court there seems to be some difference of opinion, see *Jai Kishen Joshi v. Budaanand Joshi*⁵. With all respect we prefer to follow the view taken by the Calcutta, Bombay and Madras Courts.

Article 148 not applying, the only other article that could be applied is article 144. The District Judge has found that adverse possession began either when the sale to Mada Nadan ignoring altogether plaintiff's vendor's rights in the property was made and he began to hold the property under that title or at any rate when the plaintiff's vendor claimed possession from Mada Nadan in 1901 by Ex. I and he refused to give possession.

More than 12 years have elapsed from either point of time and we need not therefore decide which of them was the real starting point of adverse possession. The suit is therefore barred under Art. 144 and was rightly dismissed by the lower appellate Court.

The Second Appeal fails and is dismissed with costs.

C. A. S.

Second Appeal dismissed.

1. (1902) I L. R. 26 Bom. 500 2. (1918) I L. R. 41 Mad. 650 3. M.L.J. 528
 4. (1918) 1 L. R. 46 Cal. 111 5. (1889) J. L. R. 14 All. 1.
 5. (1915) I L. R. 38 All. 188.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE KRISHNAN.

Kodali Kristnayya and others ... *Appellants* * (*Plaintiffs*.)

v.

Kodali Guravayya and others ... *Respondents*. (*Defendants*.)*Hindu law—Joint Hindu family—Liability to account—Nature of—Re-union—Re-uniting members bringing varying amounts—Subsequent partition—Quantum of shares.*Kristnayya
v.
Guravayya.

Although the manager of a Mitakshara Joint Hindu family is not responsible for the manner in which he disposed of the family income in the past except in case of fraud and misappropriation, he cannot when a partition is demanded evade his liability to give an account of the assets of the family as it existed at the time of partition. The other members of the family are not bound to accept the statement of the Karta as to what the properties at the time of the partition consist of and the court can order an account of the properties to be taken.

When a partition suit is brought and it becomes necessary to decide what the joint properties are which are available for division the parties not being agreed about it the managing member will have to explain what became of the joint properties such as have been traced to his possession prior to the date of the partition to avoid an inference being drawn against him that they are still subsisting in his hands. For such a purpose he may have to give an account of what he did with such properties lest he should be debited with them at the time of the partition. *Balakrishna Iyer v Muthusami Iyer* (1.) distinguished. *Parameshwar Dube v. Gobind Dube* (2) referred to.

Per *Phillips, J.* :—In the case of a re-union in Hindu law even though the re-uniting members bring into the common stock properties of unequal value, the re-union restores them to their original joint status and when a partition is subsequently effected, they are entitled to the same shares as at the original partition irrespective of the amount of capital contributed by each co parceller. *Pranjivandas Shival v. Icharam* (3) followed, *Narasimhachari v. Venkata Singarama* (4) and *Kristnaya v. Venkataraniya* (5). *Alamelumangathayarammah v. Nampierumat Chetty* (6) not followed.

Appeal against the decree of the Court of the Additional Temporary Subordinate Judge of Guntur in O. S. No. 2 of 1918, dated 18th September 1919.

A. Krishnaswami Aiyar and *V. Ramadoss* for appellants.

P. Narayanamurthi for respondents.

The Court delivered the following

Judgments :—*Phillips, J.* :—The defendant's appeal against the partition decree having been dismissed, it remains to consider

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Appeal No. 388 of 1919.

25th and 26th April and 6th May, 1921.

1. (1908) 1 L. R. 32 Mad. 271.

2. (1915) 1 L. R. 43 Cal. 459.

3. (1916) 1 L. R. 39 Bom. 784.

4. (1909) 1 L. R. 33 Mad. 165.

5. (1909) 1 L. R. 19 M. L. J. 723.

6. 1 L. R. 33 I. C. 824.

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the cross appeal filed by the plaintiffs. The subordinate Judge has found that at the time of the reunion, the 1st defendant brought into the common stock property worth Rs. 40 more than the 1st plaintiff's father and he has in consequence given plaintiffs a decree for only 9/20 of the property instead of one half share. Even if he is right in law, the amount of the share has been wrongly calculated ; for if the 1st plaintiff's father contributed Rs. 400 and 1st defendant Rs. 440 out of the total Rs. 840, as has been found, the respective shares would be 10/21 and 11/21. However, we have now to consider whether there should be this unequal distribution of the property. It is contended for the plaintiffs that a reunion between the parties restores them to their original status and that when a partition is effected, the shares are the same as they would be at the original partition irrespective of the amount of capital contributed by each coparcener. This is certainly the law in the Bombay Presidency. We find that in the Printed Judgments of the Bombay High Court Vol. I. p. 67 it was held that where after partition, the coparceners reunite, they are restored to their original position notwithstanding that the portion brought on reunion may be unequal. In *Pranjwandas Shivilal v. Icharam* ¹ the same principle was affirmed. We see also that in *Prankishen Paul Chowdry v. Mothooramohan Paul Choudry* ² the Privy Council held that a reunion of a brother to the family remitted him to his former status as a member of a joint Hindu family, and it is was further held that, where one of the coparceners had acquired property during the period of separation, if the monies employed for that acquisition were drawn from the joint estate, it followed that on reunion the other brother was entitled, upon the general principles of the Hindu Law, to share in that property as an acquisition made by the use of the joint funds. No doubt in that case there was a written agreement entered into between the brothers, but the Privy Council based their decision not only on the express provisions of the deed but on the general principles of the Hindu Law. If we follow that decision here, it is quite clear that the property acquired by the 1st defendant during the period of separation must in the absence of evidence to the contrary, be presumed to have been acquired from the funds which he received out of the family estate, and that being so, the plaintiffs

1. (1915). 12 L. R. 89 Bom. 734.

2. 10 M. I. A. 403.

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 —
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would be entitled to share in those acquisitions and therefore on partition to an equal share in the whole estate. The view that the coparceners are entitled proportionately to the capital they contribute, on reunion is based on a passage in Smrithi Chandrika Ch. XII, para. 4. That passage appears to have been indirectly applied in the case reported in *Manjanatha v. Narayana* ¹ but there is no such provision in the Mitakshara which is the main authority in this Presidency. The effect of that provision is to hold that there is no reunion in an undivided family as such but only the constitution of a tenancy in common between the previous joint coparceners, each holding a definite share in the coparcenery. This appears to be opposed to the primary idea of a joint family in which there are no definite shares and the members take by survivorship, and it is this view that has apparently found acceptance in this Court as well as in 10 M. I. A. 403. In *Narasimhacharlu v. Venkata Singaramma* ² it was held that succession in a reunited Hindu family governed by Mitakshara Law is by survivorship and in *Krishnayya v. Venkatramayya* ³ a Full Bench of this Court held that this contention of proportionate shares could not be supported by any text of the Hindu Law and was opposed to the fundamental conception of the status of an undivided Hindu family or of a reunited Hindu family. Whether this passage in Smrithi Chandrika was quoted before the Learned Judges in that case does not appear from the report; but it was quoted in a later case reported in *Narasimhacharlu v. Venkata Singaramma* ² in which a Bench of this court declined to accept the authority of the Smrithi Chandrika and followed the previous Full Bench ruling. There is one case *Alamelumangathayaranmah v. Namberumal Chetty* ⁴ in which a single judge of this Court Sankaran Nair, J. held the contrary view; but the large balance of authority is in favour of the view that on reunion the members of the family are remitted to their original status. In that view the plaintiffs are entitled to an equal share of the family property from the defendants and the decree must be modified accordingly.

1. (1882) 1 L. R. 5 Mad. 362. 2. (1909) I. L. R. 33 Mad. 165; 19 M. L. J. 719.

3. (1909) 19 M. L. J. 723.

4. 28 I. C. 824.

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A further objection is taken by the plaintiffs that the 1st defendant has not properly shown the outstandings due to the family. The Subordinate Judge has held that as plaintiffs have been unable to prove what exactly these outstandings were they are not entitled to demand an account, and has based his opinion on the principle that a Hindu Manager cannot be called upon for an account. The principle stated thus broadly goes a little bit too far. No doubt a Hindu manager is not responsible for the manner in which he has disposed of the family income in the past, except in the case of a fraud or misappropriation, but when a partition is demanded he cannot evade his liability to give an account of the assets of the family as it existed at the time of partition. This question has formed the subject of various decisions, and on a consideration of these decisions it was held in *Parmeshwar Dube v. Gobind Dube*¹, that in an ordinary suit for partition in the absence of fraud or other improper conduct, the only account the Karta (or manager) is liable for, is as to the existing state of the property divisible and the parties had no right to look back and claim relief against the past inequality of the enjoyment of the members or other matters. This was the view taken after considering most of the cases which have been quoted before us now, and with respect, I must express my concurrence with that view and with the further view that the parties are not bound to accept the statement of the Karta as to what the properties consist of and that the manager is the accountable party and the Court can order an account to be taken.

A further question which then arises is in what way is the manager to be made to account. Primarily he should (being the person in the best position to know the facts) be compelled to prove the assets available at the date of the partition and if he fails to adduce such evidence as he can or ought to adduce, a presumption may be made against him. In the present case, a commissioner was appointed to take charge of the property and the accounts, but the 1st defendant evaded production of a box containing all current documents belonging to the family. Admittedly the 1st defendant had been lending out monies, for we see from a list, Exhibit EE, which according to the 1st defendant, was

1. (1915) I. L. R. 43 Cal. 459.

prepared about 1909 that there were outstandings due to the family to the extent of 5 to 6 thousand rupees. The 1st defendant now only admits a total of Rs. 3,300 whereas plaintiffs estimate the amount at Rs. 18,000. I think it is quite clear that the 1st defendant has not acted quite fairly in this case and the Subordinate Judge remarks that he has strong reasons to suspect that the defendants have not been fair in putting before the court all the current documents relating to the joint family money lending business. In this state of the evidence any reasonable presumption can be drawn against the 1st defendant. He had admittedly been paying income-tax regularly on an income derived presumably from his money-lending business. He first paid a tax of Rs. 20 and then it was raised to Rs. 28 one or two years ago. It is not disputed that the family properties produced paddy largely in excess of the family requirements and that the family income is greater than the necessary expenditure. In order to bring in an income of Rs. 1,000 which is the income which is taxed at Rs. 20 the first defendant must have had a capital of not less than 11 or 12 thousand rupees, assuming that he got interest on the whole amount at 9 per cent. which is, I think a fairly liberal figure. He all along had a capital of Rs. 12,000 and he has not shown how that has been reduced to the figure of Rs. 3,000 and odd which he now puts forward. I would therefore hold that the outstandings amount to Rs. 12,000 and the plaintiffs are entitled to their share therein. The decree will be modified accordingly. Defendants will pay plaintiffs' costs in this appeal.

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Krishnan, J. :—I agree with my learned brother that plaintiffs are entitled to get an equal share with the defendants of all the joint property. Item 40 of A Schedule and the lands described in Exhibits XXVII and XXVIII have been found not to be joint property and that finding was not disputed before us and those lands are rightly excluded from the partition.

Krishnan, J.

No doubt the *Smrithi Chandrika* states clearly that when a second division takes place between reunited brothers who had once divided before, the share to be given to each is not equal but is proportionate to the value of the property each brought into the common stock at the time of the reunion. See Chapter XII, p. 1, III translation Ghose's Hindu Law Vol. II page 406. As

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pointed out by my learned brother the relevant rules of Smrithi Chandrika have not been followed in some of the reported cases in the Presidency, see *Narasimhacharlu v. Venkata Singaramma*,¹ and *Kristnayya v. Venkatramayya*,² though in one case they were followed, see *Alamelumangathayarammah v. Namberumal Chetty*.³ In the view I take of the facts of this case it is not necessary for me to express my opinion as to which of the above views is correct and I refrain from doing so. In the case before us though there was a partition in 1867 and separate properties were allotted to the 3 brothers it was only one brother Ramanna that actually separated himself off. The other two seem to have lived together and enjoyed their properties in common, the 1st defendant managing the properties as he was the more capable man though he was younger than his brother Viranna. This is proved by the evidence on plaintiff's side which I think is reliable. At any rate there is clear documentary evidence Exhibit V that in 1892 the brothers were living as a joint family with the 1st defendant as the manager. The evidence does not show when exactly they reunited but I think the probability is that they all along enjoyed the properties jointly though they were divided. I am unable to accept the position taken up by the Subordinate Judge that they reunited for the first time in 1892 and that in doing so the 1st defendant put property worth Rs. 440. into the common stock whereas the 1st plaintiff's father's contribution was only worth Rs. 400. In my opinion the evidence is not sufficient to prove any such definite case. If there were additions made to the joint stock by 1892 the presumption is that they must have been acquired by the 1st defendant from the joint funds in his hands and were therefore also joint property to which the brothers were equally entitled. See *Prankishen Paul Chowdry v. Mothooramohun Paul Chowdry*.⁴ There is thus no reason to differentiate between the shares of the plaintiffs and of the defendants in this case. Plaintiffs should get a $\frac{1}{3}$ share and the credit given to the 1st defendant in the decree for Rs. 140 should be struck off.

The next point has reference to the outstandings due to the joint estate. It is now well established that the managing

1. (1909) F. L. R. 33 Mad. 165 19 M. L. J. 719.

2. (1914) 23 F. C 824.

3. (1903) 19 M. L. J. 723.

4. 10 M. I. A. 403.

member of a joint Hindu family is not liable to account for his management for the purpose of making him responsible for any mismanagement by him in the past or for any loss caused by him thereby to the joint estate except perhaps where he has been guilty of fraud or misappropriation, see *Balavishna Iyer v. Muthusami Iyer* ¹. But when a partition suit is brought and it becomes necessary to decide what the joint properties are which are available for division, the parties not being agreed about it, the managing member may find it necessary to explain what became of the joint properties such as have been traced to his possession prior to the date of the partition to avoid an inference being drawn against him that they are still subsisting in his hands. For such a purpose he may have to give an account of what he did with such properties lest he be debited with them at the time of the partition. This is one way in which a managing member may be called upon to account in a partition suit. It seems to me that it is also open to the Court in such a suit to call upon the managing member as the person best acquainted with the affairs of the family to give an account of its available assets and to allow the other members to surcharge it. As pointed out by the learned Judges in *Parmeshwar Dube v. Gobind Dube* ² which is the latest case which has been brought to our notice on the point the other members of the family are not bound to accept the word of the Karta or of the Manager as to what the divisible properties are: they can ask for and the Court can order an account to be taken of the joint properties. Though the managing member is not ordinarily liable to give an account when a partition suit is brought, he may become liable to do so in the instances above mentioned.

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Now in the case before us the plaintiffs have shown by Ex. EE a list of outstandings prepared by the 1st defendant himself that there were on its date outstandings due to him, presumably as the manager, of about Rs. 6,000 and they contend that as the family lands produced paddy largely in excess of family requirements leaving about 20 puttis to be sold every year as the Subordinate Judge finds that amount was likely to have largely increased, by the interest obtained on it as time passed and they ask that the defendant should be debited with

1. (1903) I. L. R. 32 Mad. 271.

2. (1915) I. L. R. 43 Cal. 459.

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that amount with interest calculated at a reasonable rate which they put at 9 per cent. till the date of suit as the 1st defendant has not satisfactorily accounted for or proved that he had spent any portion of the amount. Taking the date of Ex. EE as 1903 as the debts included in it would seem to indicate and adding 9 per cent. interest which is very ordinary rate for men of this class to get, for 12 years and making allowance for bad debts the amount would have increased to over Rs. 12,000 by the date of the suit. Except making vague statements that he spent large sums of money for the marriage of his daughters, etc., statements which are quite unreliable, he has given no help to the court by producing proper evidence or accounts to decide how much money is still outstanding to the credit of the joint estate. As pointed out by the learned Subordinate Judge he has acted most dishonestly in this case by keeping away from the court the box containing the documents evidencing his money dealings and the court has also found it proved, and there is no appeal against it, that in two instances at any rate he actually took renewals of bonds for debts due to the joint estate in the names of third parties apparently for the purpose of deceiving the other members. Every presumption must therefore be made against him. The fact that he paid income tax on his money dealings of Rs. 20 first and subsequently of Rs. 28 a year would also indicate that he was working with a capital of something like Rs. 12,000/-. Taking all these circumstances I am inclined to agree with my learned brother that if we take the outstandings to be Rs. 12,000 and make him liable to account for a half share of it, Rs. 6,000, to the plaintiffs leaving him to collect and appropriate the whole of the outstandings himself we shall not be far wrong.

The learned Subordinate Judge has stated all the circumstances referred to above but has refused to draw the obvious inference against the 1st defendant because he thought he would thereby be making him account for his management. That, as I have explained above, is not correct. When plaintiffs succeeded in showing that the defendant had in his hands in 1903 Rs. 6,000 belonging to the joint estate the burden was shifted on to him to show by reliable evidence that he had spent that money to avoid the inference that it was still in his hands in an augmented form. If the money had been spent, the ways in which it was spent could not be questioned unless there

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was fraud or misappropriation for that would amount to making him account for his management, but the fact that it was spent had to be proved by him like any other fact. It was not sufficient for him merely to assert that he had spent it. I think the learned Subordinate Judge confused the two positions and thus failed to draw the proper inference.

It was further contended for him that plaintiffs having a list of outstandings which they alleged to be due to the joint estate or to have been collected by the 1st defendant and having gone to trial regarding the existence of such items they could get a decree only for such of the items as were proved against him, but they could not ask for or get a decree on a general account. For this argument reliance was placed on the case in *Balakrishna Iyer v. Muthuswami Iyer*¹ already cited. But that case is very different from this case. The observation relied on at page 275 refers to moneys collected by the Manager and not to outstandings payable to the family by third parties. What was ruled in that case was that plaintiff having alleged that the Manager had collected certain specified sums of money belonging to the joint family and had kept such moneys in his hand he must prove his allegation and that it was not open to him to ask for a general account from the Manager for the purpose. That case has no bearing on the question before us. Here the plaintiffs while adducing evidence to show the existence of certain outstandings which the Manager had tried to secrete by taking fraudulent renewals in the names of third parties alleged and proved facts to show what the general extent of the outstandings were. They were entitled to do so and there is no reason why the decree should be confined to the specific items which they have been able to prove and why a decree should not be given for what the court finds to be the real extent of the outstandings.

No other part of the decree has been challenged before us in this appeal. In the result the decree of the lower court must be modified by giving plaintiff's 40 and in those included in Ex. XXVII and XXVIII in favour of the defendants and by making the 1st defendant liable to the plaintiffs for Rs. 6,000 in being allowed to collect the whole of the outstandings. The rest of the decree will be confirmed. The defendants must pay the plaintiffs their costs of this appeal.

C. A. S.

Decree Modified.

¹, (1908) 1, L. R. 82 Mad. 271.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE ODGERS.

Yeditha Bhupatiraju and another, *Petitioner* * (*Plaintiffs*.)

v.

Bhavaraju Venkataratnam and others. *Respondents* (*Defendants*.)

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Madras Estates Land Act, Ss. 3 (5), 77 and 189—Minor inamdar—Land in a permanently settled estate granted on favourable quit-rent—Inamdar, if a 'landholder'—Suit for rent—Jurisdiction of civil court.

Where a Zemindar makes a post-settlement inam of a portion of a village with both the warams subject to the payment of a permanent and favourable quit-rent, the inamdar is not a "landholder" within the meaning of S. 3 (5) of the Madras Estates Land Act and a suit for rent by such minor inamdar against his tenants lies in a civil court. The initial presumption is in favour of the Civil Court having jurisdiction and the onus lies on the defendant seeking to oust its jurisdiction to substantiate his plea.

Opinions of the Chief Justice and Kumaraswami Sastri, J. in *Gadadara Das Bavaji v. Suryanarayana Patnaik* (1) and on appeal in 44 M. 677, followed in preference to that of Aylmer, Sadasiva Iyer and Coutts Trotter, JJ.

By *Spencer, J.* A mere interest in a portion of the melvaram as by payment of jodi or quit rent without a right to collect 'rents' from the 'ryots', of the estate will not convert a 'ryot' into a 'landholder' under the Act.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the orders of the District Court of Godavary at Rajahmundry dated 13-3-1918 in C. M. Appeals Nos. 85 and 87 of 1917 respectively preferred against the orders of the court of the District Munsif of Amalapuram in Original Suits Nos. 122 and 121 of 1916.

V. Ramadoss for petitioner.

P. Narayana Murthi and *K. Kamanna* for respondents.

The court delivered the following

Spencer, J.

Judgments :—*Spencer, J.* :—The question that comes for decision in these Civil Revision Petitions is whether two suits (O. S. Nos. 121 and 122 of 1916) instituted for the recovery of the rent or damages for the use and occupation of lands enjoyed by the defendants for three years before suit fall within the cognizance of a Revenue or a Civil Court. The initial presumption is in favour of the civil court having jurisdiction (See *Seetham Naidu v. Rami Naidu* ²). The suits were instituted in a civil court and the onus lay on the defendants to show that that Court's jurisdiction was ousted by S. 189 of the Madras Estates Land Act,

* C. R. P. No 1090 and 1091 of 1918

5th April, 1921.

1. (1919) 38 M. L. J. 342.

2. (1909) I. L. R. 33 Mad. 208.

which reserves to Collectors the jurisdiction over suits and applications of the nature specified in the schedules to the Act. In schedule A item No. 8 relates to suits by a landholder to recover arrears of rent under S. 77. Therefore the answer to the above question depends on the further question whether the plaintiffs are landholders, as the word is defined in S. 3 (5) of the Act. The District Munsif held that the plaintiffs were landholders and directed the plaints to be returned for presentation in a Revenue court, and on appeal the District Judge confirmed this order.

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It is not pretended that the suit lands themselves are major inams or whole inam villages constituting an estate within the definitions in S. 3 clause 2 sub-clauses (d) or (e), but they lie within a Zamindari, which is an estate under sub-clause (a). 'Landholder' is defined in clause 5 of S. 3 as a person owning an estate or part thereof and as including every person entitled to collect the rents of the whole or any portion of the estate by virtue of any transfer from the owner.

The plaintiffs hold the suit lands by virtue of a grant from the zemindar of Guttinadeevi made in the years 1837 and 1839 as evidenced by the pattas, Exhibits A series, the letters, Exhibits B series and the check namas Exhibits C series.

The thing of first importance is to see what it was that the plaintiffs got by this grant. The statement in the documents that the lands were part of the never cultivated waste lands of the estate, the use of the word 'patta' which is defined in S. 2 of Regulation XXX of 1802 as an engagement between proprietors of land and their cultivators or ryots, the allusion to S. 15 of that Regulation which deals with leases for a term of years or in perpetuity for clearing and bringing waste lands into cultivation, and the direction to cultivate the lands and enjoy the produce for generations of sons and grandsons are all indications that the transaction was of the nature of a permanent lease, and that the plaintiff's ancestors thereby got the kudivaram or occupancy right in the land. The imposition of a low rent which is described as a 'grant' assessment, the description of the grant as being that of a manyam and its comparison to a gift to a deity all import that the zemindar simultaneously parted with a part of his melvaram or landlord's share of the produce. Apart from the significance of the words used in these documents, it has been recently held

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by a Full Bench in second appeal No. 1878 of 1919. *Muthu Goundan v. Perumal Iyen* * that in the case of inams the Court should start with a presumption that the grant was of both varams. Several decisions of this Court, prominent among which are those in *Ponnusamy Padayachi v. Karupudayan* ¹ and *Upadrasta Venkata Sastrulu v. Dipi Sitaramudu* ² have made familiar the rule enacted by S. 8 (1) of Act I of 1908 that a landholder does not acquire the status of a ryot by merger of his entire interests as landholder with those of an occupancy ryot ; and there is a reported case in the *Zemindar of Sanivarapet v. The Zemindar of South Vallur* ³ and a recent Full Bench Case in second appeal No. 65 of 1919 *Marina Veeraswami v. Boyyinapalli Venkatrayudu* [†] which dealt with the position of a ryot who subsequently became interested in the melvaram which brought into play the provisions of the explanation to sub-section 6 of S. 6. So the principles of 'once a landholder, always a landholder' and 'once a ryot, always a ryot' may be said to be fairly well established.

The present case however is one of a simultaneous grant of the kudivaram and a part of the melvaram, to which there are no provisions in the Act directly applicable. But there can be no doubt that if the plaintiffs were not the less ryots by reason of their getting the suit lands on a favourable tenure, S. 19 operates to take their relations with their tenants out of the provisions of the Madras Estates Land Act.

I will now proceed to consider whether the plaintiffs can be described as persons owning an estate or part thereof, or as persons entitled to collect the rents of the whole or any portion of the estate by virtue of a transfer from the owner. I have already noted the resemblance of the grant in their favour to the grant of a permanent lease. It was held in *Kshatra baro Bissoyi v. Harikrishna Naidu* ⁴ and again in the *Maharaja of Viziana garam v. The Collector of Vizagapatam* ⁵ following the Privy Council case in *Venkateswara Zettapali Naidu v. Alagoo Moothoo Servagaran* ⁶ that the grant of a permanent lease of a portion of a zemindari was not a transfer of

* 40 M. L. J. 429 : 44 Mad. 588.

† (1920) 39 M. L. J. 225.

1. (1914) I. L. R. 38 Mad. 848 : 26 M. L. J. 285.

2. (1914) I. L. R. 38 Mad. 891 : 26 M. L. J. 585.

3. (1915) I. L. R. 39 Mad. 944. 4. (1910) I. L. R. 33 Mad. 340 : 20 M. L. J. 417.

5. (1914) I. L. R. 38 Mad. 1128 : 27 M. L. J. 278. 6. 8 M. I. A. 327.

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ownership. The Privy Council were dealing with a perpetual lease at a low rent of a distinct part of a zemindari and they held that it could not be considered as a transfer of proprietary right in the whole or any part of a zemindari under S. 8 of Regulation 25 of 1802 without doing violence to the language. It is clear that the transfers of proprietary right to which that section applied were very different in nature from the leases for a term or in perpetuity referred to in S. 15 of Regulation XXX. The reference to the latter section in exhibit A becomes thus very significant as showing that what was given was the interest of a ryot rather than that of an intermediate landholder. On the other hand it was held by a full Bench in *Nellayappa Pillai v. Ambalavana Pandarasannadhi*¹ that a person who takes from a zemindar a permanent lease of the zemindar's melvaram rights was a landholder under the former Rent Recovery Act (VIII of 1865) as he becomes thereby a farmer of the rent under a landholder and so belongs to the class of farmers or izaradars referred to in S. 1 of that Act and in the Explanation to Sub-S. 11 of S. 3. of the present Act.* The present plaintiffs are not farmers under a zemindar as they are not entitled to collect the entire rent due to the zemindar from the whole or any defined portion of his estate. As observed by the learned Chief Justice in *Gadadharadoss Bavaji v. Suryanarayana Patnaik*². "An inamdar who holds under a zemindar subject to the payment of quit rent to him is not the owner of the Inam land in the ordinary legal meaning of the word owner". . . . "So long as a full owner in making a grant reserves an interest to himself as by way of rent, he and his successors continue to be owners, no matter how insignificant may be the interest he reserves for himself." This interpretation of the meaning of the word 'owner' followed a prior decision by the Chief Justice and Kumaraswami Sastry, J. in *The Maharaja of Vizianagaram v. The Collector of Vizagapatam*³ and I respectfully agree with their opinions.

* The Explanation to S. 3 Sub-S. (11) of the Act was in these terms: "Explanation. The payments to be made by a farmer of the rent to a landholder shall not be recoverable under this Act." This provision has been repealed by S. 2 of Madras Act IV of 1909, but the repeal does not affect the reasoning of His Lordship—[Reporter].

1. (1903) I. L. R. 27 Mad 465.

2. (1920) 38 M. L. J. 342.

3. (1914) 1 L. R. 88 Mad. 1128.

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Sadasiva Ayyar, J. who dissented, was unwilling to depart from the principles of the decisions in *Appalanarasimhulu v. Sanyasi* ¹ and *Kanti Venkanna v. Chelikani Rama Rao Ganu* ². When this case came on appeal to a Bench of three Judges in L.P.A. No. 2 of 1920. * Kumaraswami Sastry, J. agreed with the Chief Justice and expressed an opinion that a minor inamdar was not a landholder when the grant to him was of both varams, and although, as a result of the agreement of Ayling and Coutts Trotter, JJ. with the opinion of Sadasiva Ayyar, J., the appeal was allowed, it is clear from the judgment that neither Ayling, J. nor Kumaraswamy Sastry, J. was able to reconcile the position of a grantee of an interest in the melvaram who was himself the occupancy ryot with the status of one who is entitled to collect rents by virtue of a transfer from the owner, for, as Ayling, J. remarked, "it would be pedantry to speak of the grant as a transfer to the ryot of the right to collect rents from himself."

Another difficulty noticed by the learned Chief Justice is that of treating the payments made by tenants to an inamdar for use and occupation of land which is not the inamdar's estate as "rent" as defined in clause 11 of S. 3.

I have no doubt that when the Rent law of the Presidency was remodelled it was intended to preserve the old distinctions between landholders and tenants, while giving statutory recognition to the occupancy right of tenants in large estates which had become firmly established by numerous decisions of this High Court. Under Act VIII of 1865 a "tenant" was a person who paid rent to a land-holder and thus corresponded to a "ryot" under the present Act. It was held in *Suryanarayana v. Appa Rau* ³ that an inamdar with a right of occupancy did not acquire the status of a landholder in consequence of his subleasing the land to others but he retained the status of tenant. Similarly under the present Act a Full Bench of five Judges in *Marina Veeraswami v. Boyyinapalli Venkatarayadu* ⁴, declined to treat the remission of a portion of the rent payable to a zemindar by a ryot as conveying to him any right to collect rent from third persons.

* Since reported in I. L. R., 44 M. 677, 41 M. L. J. 97.

1. (1912) I. L. R., 38 Mad. 33.

2. (1914) I. L. R., 38 Mad. 1155.

3. (1892) I. L. R., 16 Mad. p. 40.

4. (1920) 39 M. L. J. 225.

When the effect of S. 3 cl. (2), (d), read with cl. 5 is that a major inamdar who owns the kudivaram is not a land-holder, it is difficult to attribute to the legislature an intention to put minor inamdars who own the kudivaram into the position of land-holders under the Act.

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I am of opinion that when a ryot sublets the land in his enjoyment to subtenants, the payments he collects from them by agreement with them are not "rent" within the meaning of the phrase in S. 3 (11) of the Madras Estates Land Act, and that the plaintiffs in this case who acquired by their grant from the zemindar a right either to cultivate the land themselves or to sublease it, as one of the incidents arising out of the unconditional nature of the grant, cannot be said to have thereby become transferees of the title to collect the rents of the whole or any portion of the zemindari estate.

From a consideration of the reported cases upon the meaning of the word "land-holder" in Act I of 1908 one axiom clearly emerges. A mere interest in a portion of the melwaram as by payment of jodi or quit rent without a right to collect rents from the ryots of the estate will not convert a ryot into a "landholder" under the Act.

The right to collect rents is an attribute of full ownership of an estate. In the present case that right has remained all along with the zemindar. What the zemindar now collects from the plaintiffs is rent, though not the full rent. If he were to resume this darimilla inam for a breach of the conditions of the grant or for failure of heirs or upon relinquishment of the inam, the Zemindar would collect the full rent once more.

I think that much of the difficulty in applying the provisions of the Act to the facts of actual cases and a good deal of the unfortunate differences of opinion among Judges who have had to apply them, has arisen out of the vagueness of the definition of "landholder" in S. 3 (5) and the want of illustrations to the section.

When once a sharp line of distinction is drawn between persons who merely possess an interest in a portion of the landholder's share of the produce or melwaram and those who have derived a title from the estate owner to collect the entire rents accruing to him over the whole or a defined portion of his estate, the cases that arise in practice will naturally group themselves on one side or other of the dividing line.

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Spencer, J. The decisions in *Appalanarasimhalu v. Sanyasi*¹ and *Brundavana Chendra Horischandana Jaggad Raja Bahadur v. Proghada Ramayya*² may be justified on the ground that the right to collect rents passed in those cases, while 38 Mad. 1155 may be wrong. In this case the admission of the plaintiffs in paragraph 4 of the plaint that they are entitled to the kudivaram and the melvaram rights does not by itself suffice to constitute them landholders. I consider that the civil courts below were in error in treating them as landholders and that the District Munsif's order declining jurisdiction and returning the plaint should be set aside and he should be directed to take the suits on file and dispose of them himself.

Costs throughout to abide and to be provided for in the final decree.

Odgers, J. *Odgers, J.*—These are petitions to revise the order of the District Judge of Godavari confirming the order of the District Munsif of Amalapuram by which the plaints in O. S. Nos. 121 and 122 of 1916 on the file of that court were directed to be returned for presentation to the proper court. The suits were for rent or damages for use and occupation of certain lands situate in the Guttinadevi Zamindari.

The District Munsif held and the District Judge did not disagree with him, that the suit lands were ryoti lands; and the question for determination is whether the grantees of these lands are or are not land holders within section 3 (5) of the Madras Estates Land Act. The grants are contained in Exs. A, A1, and A2. Ex. A is dated 24th June 1839 and purports to be a patta by the zamindar giving 22 putties of land to the grantee as manyam "out of the never cultivated waste lands of Guttinadevi Zemindari" under clause 15 of Regulation XXX of 1802 settling the tirva (*i. e.* rent assessment or tax) at Rs. 1-0-0 per putti. "You shall pay us the tirva of Rs. 22-0-0 settled for each year for the said 22 putties, raise crops on the said lands and enjoy the usufruct thereof by generations and remain happy". Ex. A1 is a grant of 3 putties of land as manyam "out of the never cultivated waste or Banjar lands for coming under your permanent (or more correctly that you may enjoy permanently) * * * you shall pay us

1. (1921) I. L. R. 38 Mad. 33.

2. (1914) 26 M. L. J. 600.

the tirva of Rs. 12 per cent *i.e.* Rs. 4 per putti settled for each year for the said 3 putties, raise crops on the said lands and enjoy the usufruct thereof by generations of sons and grandsons and remain happy." "Ex. A 2 is to the same effect a grant of 8 putties of land at Rs. 4 per putty. Exs. B, B1 and B2, are instructions issued to the various karnams by the zamindar to locate the lands granted and to issue checknamas. From these documents it would appear that the grants were manyams or minor inams, amounting in all, to about 150 acres only. They are not grants of whole villages or of any portion consisting of one or more villages" within the wording of S. 3 (2) (e). Secondly from the wording of these documents it would appear (and it was not contended before us to the contrary) that they granted permanent leases of the lands. The plaintiffs in those suits as such Inamdars have been held by both the lower courts to be landholders under the Madras Estates Land Act. The question is whether they are right.

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The lower courts relied on *Appala Narasimhulu v. Sanyasi*¹ (Sundara Aiyar and Sadasiva Aiyar JJ.) where it was held that "an inamdar of a portion of a village where the inam consists only of some of the lands in a village granted by a zamindar is a landholder under S. 3 (5) though the inam may not be an estate under S. 3 (2) (d) and (e). The learned Judges there found that the plaintiff was undoubtedly a person entitled to collect the rents of a portion of the estate granted and that the definition of landholder includes every person entitled to collect the rents of any portion of an estate by virtue of any transfer. The grants in the present case would, no doubt, confer kudiavaram right on the grantees and the first question is whether they would confer melwaram right as well. It will be observed that the grants are all of the "never cultivated waste lands". This expression occurs in Exs. A, A1. and A2. Therefore at the time of the grants it is beyond question that there were no tenants on the land from whom rents could be collected by the grantee. I am therefore inclined to the opinion that no melwaram right was in fact granted by these documents. If I am right this is a sufficient answer to the question before us. Since the decision of the Full Bench in second appeal 1878 of 1919,

1. (1912) I. L. R. 38 Mad. 33.

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however, the presumption in the case of grants of minor inams is that the inamdar has both warams, see Judgment of Ramesam, J.

Assuming therefore, that the grants are of both the melwaram and the kudivaram, the further question is, does this make any difference?

As pointed out above *Appalarasimhulu v. Sanyasi*¹ would seem to be a clear authority for holding the grantees to be landholders. This case came under consideration in *Gadadharadōs Banaji v. Suryanarayana Patnaik*² (Wallis, C. J. and Sadasiva Aiyar, J.) and led to a difference of opinion between those learned judges. Sadasiva Aiyar, J. adhered to his former opinion on the ground that a majority of the judges of this court have followed the opinion expressed by himself and Sundara Ayyar, J. in *Appalarasimhulu v. Sanyasi*¹ and expressed himself as unwilling to depart from this catena of decisions. The learned Chief Justice after examining the terms of the Act very closely comes to the conclusion that it was not the intention of the legislature to apply the provisions of the Act as between the inamdar and his tenants where the land is situated in a permanently settled estate and consists of any part of the village and the inamdar is the owner of the kudivaram as well as the melwaram. He says at page 344 "Therefore as regards inams outside the large estates coming under clauses (a) (b) and (c) (i. e.) of section 3 (2) it is clear that the legislature did not wish, the Act to apply between the inamdar and his tenants where the inamdars owned the kudivaram as well as the melwaram or where the land was only part of a village unless it had been separated from the rest of the village. This being the policy of the Act as regards inams outside large estates as defined in clauses (a) (b) and (c) the next question is whether it was the intention of the legislature that the act should apply to such inams when the lands were situated within these large estates". After observing that it was *prima facie* unlikely that the legislature should have intended to apply two different rules in two cases without an express provision to that effect, the learned Chief Justice proceeded. "The legislature having thus expressly made the Act apply as between the inamdar and his tenants in the case of certain inams in these

1. (1912) I. L. R. 38 Mad. 33.

2. (1920) 38 M. L. J. 842.

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large estates by virtue of the definition in clause (c) the next question is whether it intended to nullify that definition and render it altogether nugatory by adopting a few lines lower down a definition "of land holder" wide enough in terms to include holders of inams and other under tenures in the larger estates, where the inam in question did not consist of one or more villages but as here of a lesser extent. The onus of showing that the definition of landholder had this extra-ordinary result is strongly on those who affirm it." The learned Chief Justice further observes: "So long as a full owner in making a grant reserves an interest to himself as by way of rent he and his successors continue to be the owners, no matter how insignificant may be the interest he reserves for himself. The learned Chief Justice next addressed himself to the argument that the inamdar must be a landholder because he is entitled to collect rents from the definition of rent in S. (311). But he points out that rent is "a payment to a landholder for the use or occupation of land in his estate, and cannot therefore include a payment by tenants to an inamdar for use and occupation of land in an estate which is not the inamdar's estate but is the estate of the superior land holder." On this difference of opinion between the learned Chief Justice and Sadasiva Aiyar, J. the case went to Letters Patent Appeal and was heard by Ayling, Coutts Trotter and Kumaraswamy Sastri, JJ. (L.P. Appeal No. 2 of 1920). Ayling, J. was of opinion that the inamdar was a land holder relying principally on the amendment to the Act in S. 3 (11). Rent originally in sub-section included quit-rent, jodi, etc., payable by an inamdar as such to the land holder. Ayling, J. says "It seems to me that the legislature could only have intended deliberately to take away the power specifically conferred on a landholder by the Act, as it was originally enacted to treat his inamdar as if he were a ryot in respect of the realization of quit-rent." This would not appear to deal conclusively with the question as to whether the grantee would be a land-holder when not only the melwaram but also the kudiwaram was transferred. The learned judge admits that this fact occasioned him some doubt but he comes to the conclusion that it makes no difference. The judgment of Coutts Trotter, J. is to the effect that the word 'land-holder' in S. 3 (5) inevitably brings a minor inamdar within its scope on the ground that it cannot be said that a minor inam-

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dar is not a person entitled to collect the rents of a portion of the estate, by virtue of a transfer from the owner. In my opinion the answer to this is to be found in the passages from the judgment of the learned Chief Justice quoted above. Kumaraswamy Sastry, J. was of opinion that a minor inamdar is not a land-holder where the grant to him is of both the varams. He says that "the legislature has therefore been careful in so framing the definition of the word 'estate' as to exclude such minor inamdars, and I agree with my Lord in thinking that it could not have been the intention of the legislature which carefully excluded minor inamdars when framing the definition of 'estates' to let them in bodily by virtue of a definition of a land-holder, a few lines lower down". Again however "if the amount the grantee has to pay can be regarded as a favourable rate of rent" (as I think it must be in the case before us) "or if the effect of the grant cannot be treated as a transfer of the right to collect rent owing to there being no person already paying it whose liability is transferred, it is clear from the decision of the Full Bench in *Marina Veeraswami v. Boyinapalli Venkataravudu* ¹ that the tenants of the grantee would not be governed by S. 6 cl. 1 and acquire a permanent right of occupancy. It has to be noticed therefore that while three judges in that case were finally in favour of holding the grantee to be a land-holder two judges were of the opposite opinion.

As already stated the opinion of the Bench of three judges was that of a Letters Patent Appeal and not of a full Bench; and with respect I prefer to adopt the reasoning of the learned Chief Justice and Kumaraswamy Sastry, J. on this question.

It remains to consider some of the cases that have been cited before us. *Kanti Venkanna v. Chelikani Rama Rao Garu* ² held per Sadasiva Ayyar, J. and my brother Spencer, J. that although a person might not be the owner of an estate he might still as alienee of part of the melwaram be a land-holder within the meaning of S. 3. (5). The judgment of Sadasiva Ayyar, J. follows the earlier case *Appala Narasimhalu Sanyasi* ³ to which he was a party, it has to be observed that in that case the grant clearly alienated Rs. 125 of the annual

1. (1920) 89 M. L. J. 226.

2. (1914) I. L. R. 88 Mad. 1155.

3. (1912) I. L. R. 38 M. 33.

melwaram. My brother Spencer, J. observed that "if the plaintiffs come within the definition of land-holder in S. 3 (5) the jurisdiction of the revenue court over a suit to eject a ryot was not ousted. It may be possible to hold that the case is confined to the construction of a particular grant under construction. In any event it does not carry the matter further than *Appalanarasimhulu v. Sanyasi*.¹ The case in *Chippurapalli Appayya v. Raja Kakarlapudi Ramachandra Raju*² lays down that the owner of a portion of an estate is a landholder whether the portion was severed before or after the passing of the Act. The question therefore arises whether a permanent lessee such as the grantee in the case before us an owner or not. The case in *Venkateswara Yitliapah Naicken v. Alagoo Moothoo Servaigaran*³ is an authority that a perpetual lease of a distinct portion of a zamindary is not within S. 8 of regulation XXV of 1802 and is not the sale, gift or transfer.

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In *Nallayappa Pillai v. Ambalavana Pandara Sannadhi*⁴ a reference to the Full Bench was made whether the defendants were entitled to relinquish under S. 12 of the Rent Recovery Act VIII of 1865. The defendant were the permanent lessee of the melwaram rights of the plaintiff who was a zamindar and for the purpose of that section it was held that the defendants were farmers under the inamdar and were not in the position of tenants but of landlords and that they therefore were not entitled to relinquish their interests at the end of the Revenue year. There is no contention that the plaintiffs are farmers here? In the *Maharaja of Vizianagaram v. the Collector of Vizagapatam*⁵ it was held that a permanent lessee is not an owner for the purpose of S. 2 of the Madras Assessment of Land Revenue Act I of 1876, nor is a proprietor or owner under Regulation 25 of 1802 or the Madras Hereditary Village Offices Act, III of 1895. It also seems to me that the permanent lessee would fall under the observation of the learned Chief Justice in *Gadadharadoss Bavaji v. Suryanarayan Patnaik*⁶ that so long as full owner reserves any kind of interest to himself however insignificant it might be, he and his successors continue to be the owners. We were referred

1. (1912) I. L. R. 38 Mad. 33.

2. (1914) 27 M. L. J. page 490.

3. () 8 M. I. A. 327.

4. (1904) I. L. R. 25 Mad.

5. (1914) I. L. R. 38 Mad. 1128.

6. (1920) 38 M. L. J. 342.

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to an unreported case S. A. No. 1169 of 1917 before Spencer and Krishnan, JJ. It followed the decision in *Kanti Venkanna v. Chelikani Rama Row Garu* ¹ and Krishnan, J held on the construction of the grant in that case that the Dharmakarthā of the choultry was a grantee of a fraction of the melwaram. This case again does not take the matter any further than the decision in *Kanti Venkanna v. Chelikani Rama Row Garu* ¹. In fact that grant in the unreported cases seems to have been of lands belonging to the same estate as that involved in *Kanti Venkanna v. Chelikani Rama Row Garu* ¹.

It cannot in my opinion be said that the authorities are in a very satisfactory state even if the decisions are restricted to the particular grants in question in each case. But with regard to these minor inams we have the reasoned judgment of the learned Chief Justice and Kumaraswamy Sastri, J. above referred to and it seems to me on an examination of the Act that these opinions are to be preferred to those which conflict with them. I would therefore hold that the plaintiff is not a land-holder within S. 3 (5) as either owning the estate or part thereof or as being entitled to collect the rents by virtue of the transfer.

The petitions must be allowed and I agree with the order proposed by my learned brother.

A. V. V.

Petitions allowed.

[In C. R. P. 426 of 1919 (41 M. L. J. Notes of recent cases, page 1) another Bench of the High Court has taken the opposite view, following the opinion of the majority in I. L. R. 44 M. 677—Ref.]

¹. (1914) I. L. R. 38 Mad. 1155.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE NAPIER AND MR. JUSTICE ODGERS.

Thirumalasseri Kottayil Sreedharan

Vallia Rajah styled Churaran of
Iswaramangalam Amsham ... Appellant* (Plaintiff.)

v.

Parakkat alias Karuthedath alias ... Respondents 24 to 29 are
Parapalli alias Kandarath Illath L. Rs. of the deceased 23rd
Karnavan and Manager Kun- Respondent (Vide order
hunni alias Narayanan Nam- dated 14-7-20 on C. M. P.
budripad and others. No. 1187 of 1920.) Res-
pondents (Defendants and
L. Rs. of deceased 23rd
Respondent.

Landlord and tenant—Forfeiture—Denial of the landlord's title—Land-
lord's knowledge of denial of title prior to suit, necessary—Permanent tenure
whether can be forfeited by the denial of title—Anubhavam tenure whether for-
feited by the denial of landlord's title—Amendment of plaint whether can be
allowed if defendant prevented setting up limitation.

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In order to forfeit a lease on the ground of denial of title by the tenant, the
landlord must prove not merely that the title of the landlord was denied but that
it came to his knowledge prior to the suit. *Kamalooti v. Muhammad* (1) followed,
Mharajah of Jeypore v. Rukmani Pottamaha Devi (2) referred to.

A permanent lease may be forfeited by a denial of the landlord's title. *Abhi-
ram Goswami v. Shyama Charan Mandal* (3) referred to.

Quære, Whether an anubhavam tenure can be forfeited by a denial of the
landlord's title.

Per Odgers, J.—Where the suit was originally framed as for the redemption of
the karnom and an amendment of the plaint was applied for on the 8th of December
1917 seeking to amend the plaint by seeking to recover possession of the property
on the ground that the defendant was the plaintiff's tenant and that he denied the
title of the landlord in 1904 and the amendment was ordered on the 8th of Febru-
ary 1919 by the Lower Appellate Court, held, that the amendment should not have
been allowed as it prevented the defendant from setting up the plea of limita-
tion which he was otherwise entitled to do. *Kunara Venkata Perumal v.
Velayuda Reddu* (4).

Second Appeal against the decree of the Court of the Sub-
ordinate Judge of South Malabar at Calicut in Appeal Suit
No. 180 of 1918, preferred against the decree of the Court of
the District Munsif of Ponmani in Original Suit No. 291 of 1916.

* S. A. No. 1570 of 1919.

3rd March, 1921.

1. (1917) I. L. R. 41 M. 629 : 34 M. L. J. 170.

2. (1919) I. L. R. 42 M. 589 at p. 599 : 36 M. L. J. 543.

3. (1909) I. L. R. 36 Cal. 1003.

4. (1914) 27 M. L. J. 25.

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K. P. M. Menon for appellant.

C. V. Ananthakrishna Aiyar for repondents.

The Court delivered the following

Napier, J.

Judgments :—*Napier, J.* :—The appeal arises out of a suit by the plaintiff to redeem a kanom. That was the original from of the suit although it is true that in his plaint he claimed to also recover the land on the strength of title.

The defendants pleaded that they were Anubhavam tenants to the knowledge of the plaintiff.

In the course of the trial the plaintiff applied to the District Munsif for leave to amend his plaint by accepting the position that the defendants were Anubhavam tenants and claiming his right to recover the property on the ground that his title as jenmi has been denied by the defendant, which denial operated as forfeiture.

The first court had declined to grant the amendment. On appeal, the Subordinate Judge allowed the amendment but he allowed it on very narrow grounds which are to be found at the bottom of page 28. He said " By the amendment sought to be made, plaintiff only wanted to make his position clear. There was no change in the nature of the suit. Even without any specific allegation about forfeiture in the plaint the plaintiff would have been entitled to argue that in the strength of his title he was entitled to get a decree for possession inasmuch as the defendants have forfeited their right to hold the properties." In my opinion this is not a correct description of the nature of the amendment sought by the plaintiff. I do not think he only sought to make clear his original position. I am satisfied that finding that he could not prove his kanom he sought leave to bring the suit on the true footing that defendants were Anubhavam tenants.

In the order in which he gave leave to amend, the lower appellate Court however refused leave to call any further evidence, and in disposing of the appeal, the lower appellate court has found that he had not proved every thing that is necessary for the purpose of establishing his right to forfeit. What was necessary has been laid down by a Bench of this Court, to which I was a party and it is the judgment in that case on which the Subordinate Judge relies. That was the

decision in *Kemalooti v. Muhamed*.¹ The requirement laid down in that case which the lower appellate court has found not to be satisfied, is stated in the headnote to be that the denial must be made to the knowledge of the landlord. This decision has been attacked by learned Counsel on the ground that it was something new, and that no case has ever laid down that before. I believe that it is true that that the proposition had never been stated so definitely before and that was the reason why my learned brother and I thought it necessary to state the whole law and all the requirements carefully. It has however been followed in a judgment of another Bench. That is a case reported in *Ramani Nair v. Mariyamma*.² Seshagiri Iyer, J. said, "It is well understood in this Presidency that the denial must be brought home to the knowledge of the landlord and it must be unequivocal and clear, and added that in *Kemalooti v. Muhamed*.¹ and in another case this principle was distinctly stated. In my opinion, this must, as the learned Judges say, be now taken to be undisputed law in this country".

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That being so, we have to consider whether there had been such a communication as to come within the statute. In the lower appellate court the vakil for the appellant relied on a certain document, Ex. J, which was a grant of jenm right of two items of this estate by the person who now claims to be only an Anubhayam tenant. That this does operate as an unequivocal denial cannot be denied : but when it came to the necessity of showing that this had been brought to the notice of the landholder prior to the suit, the appellant was unable to do this.

That the requirements must all be satisfied before the institution of the suit is definitely stated in a judgment of their Lordships of the Privy Council in *Maharajah of Jeypore v. Rukmani Pattamaha Devi*.³ Their Lordships say as follows :—"There is here no denial by matter of record before the present suit was instituted. Denial in the suit will not work a forfeiture of which advantage can be taken in that suit, because the forfeiture must have accrued before the suit was instituted." So that on the materials dealt with by the lower appellate court, the dismissal of the suit was perfectly correct.

1. (1917) I.L.R. 41 Mad. 629 : 34 M. L. J. 170.

2. (1919) 11 L. W. 513 : 48 M. 480.

3. (1919) I.L.R. 42 Mad. 589 at page 598.

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It is urged here however that there was evidence, and that evidence is to be found in the admission made in paragraphs 7 and 8 of the written statement of defendants 1 and 2. In those paragraphs the defendants set up that they had demised items Nos. 1 and 2 on Kanom right as far back as 1865, renewed them in 1888 and that ever since that date, those items 1 and 2 have been enjoyed as the jenm of the illom of these defendants with the knowledge of the plaintiff and others. Mr. Menon has contended strenuously here that, this being an admission in the pleadings, it is evidence of the notice having been given at a date prior to the institution of the suit and that he is entitled to rely on it. The answer to this to my mind, is to be found in the doctrine that admissions must be taken either altogether or not at all, that is to say, that although a party cannot by an admission make evidence for himself, still if it is sought to use an admission against him, all the words of the admission must be taken and even if they operate in favour of the defendant, they must be taken with the words which the person seeking to rely on the admission calls to his aid. Now this is an admission doubtless but it is more : it is an allegation that the plaintiff has been under notice of the claim of the defendants since 1865 and that therefore his suit would be barred by limitation. The result to my mind is this : that the plaintiff cannot rely on this admission alone without accepting the position that his suit is barred. On this short ground I am prepared to hold that there is no material on which the court could decide that notice of the claim had come to the knowledge of the landlord notice of the claim such as would entitle him to claim the benefit of the forfeiture.

Another point taken by the defendants, is that the tenure now conceded to be Anubhavam cannot be forfeited for denial of title. It is true that there is a decision of two learned judges of this court in S. A. No. 687 of 1915. Coutts-Trotter, J. took the view that there had been previous decisions with regard to a certain service tenure which were sufficient to cover all forms of permanent lease. Srinivasa Iyengar, J. seems, as far as I can understand, to raise a very much larger point that there can be no forfeiture of any permanent lease. With regard to this latter point we have however the distinct ruling of the Privy Council in Abhiram Goswami v. Shyama Charan Mandal¹

1. (1909) I. L. R. 36 Cal. 1003.

Charan Nandi ¹ that no such doctrine is known to India. The other limited proposition in respect of that particular Malabar tenure that there can be no forfeiture for denial of title is not distinctly negatived in any particular case but has certainly been doubted. If it was necessary for the disposal of this case to decide this important question, I would, speaking for myself, certainly desire to refer the matter to a Full Bench and so I do not desire to express any personal opinion on the subject. As it is I prefer to dismiss the appeal for the reasons stated. The Second Appeal is dismissed with costs.

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—
Napier, J.

Odgers, J.—I entirely agree with the order proposed by my learned brother. I would only add a word on the subject of the amendment which was allowed by the Lower Appellate Court. The amendment was applied for on the 6th December 1917 and was granted on the 8th February 1919, the application having been dismissed by the District Munsif. It therefore follows that at the date of the amendment the defendant could have set up a plea of limitation which would have held good as against the denial of the forfeiture alleged by the plaintiff under Ex. J, dated 1904. Although no doubt, O. VI, R. 17 of the Code of Civil Procedure is very wide and allows all such amendments be made in such a manner and on such terms as may be just, still it seems to me that wide as the latitude is, there must be some limit. In this connection I would refer to the case *Kumara Venkata Perumal v. Velayuda Reddi* ² a decision of Wallis, J. (as he then was) and Sadasiva Aiyar, J, Wallis, J following the English case of *Weldon v. Neal* ³ in which the court of Appeal laid down that a plaintiff will not be allowed to amend by setting up fresh claims in respect of causes of action which since the issue of the writ have become barred by the statute of Limitations. This as I have said, is followed, in the case cited, by Wallis, J who said "with great respect it does not seem to me to be just to allow a plaintiff by amending his pleadings to revive a barred claim." Sadasiva Aiyar, J went further and was inclined to give the courts full power to amend pleadings at any stage so as to advance substantial justice without much regard to the consideration whether the judgment debtor or the defendant may

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1. (1909) I. L. R. 36 Cal. 1003.

2. (1914) 27 M. L. J. 5.

3. 19 Q. B. D. 394.

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not be prejudiced in his right to raise technical pleas, though he admitted that the courts must also possess a discretion not to allow such amendments under particular circumstances. It seems to me when it comes to an amendment of this character in an appellate court it ought not to have been allowed. What was the character of this amendment? The plaintiff by his plaint claims (a) redemption and (b) the surrender by the defendant to the plaintiff on the strength of the demise of the admission of the plaintiff's own Jenm title. By the amendment, it appears to me that the cause of action was materially changed in that it allowed the plaintiff to set up a forfeiture with regard to anubhavam or perpetual lease. It is I think clear in the original plaint there was no mention of this question of Anubhavam, but that by allowing the amendment of the claim in the plaint was not only extended but also substantially altered. In any case the amendment to my mind prevented the defendant from setting up the plea of limitation which he was otherwise entitled to do, and therefore the order on that ground alone ought to have been disallowed.

With regard to the other questions raised in this appeal I agree with my learned brother, and the Second Appeal must be dismissed with costs.

C. A. S.

Second appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

PRESENT :—~~SIR~~ WILLIAM AYLING, MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE ODGERS.

Unde Rajaha Raje Rajah Velugoti Sree

Govinda Krishna Yachendrulavaru

Rajah of Venkatagiri. Bahadur. *Petitioner* * (*Plaintiff*).

v.

Thatikola Subbiah

... *Respondent* (*Defendant*).

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—
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Madras Survey and Boundaries Act, Madras Act IV of 1897, S. 20 Clause (3)—Tenant—Meaning of — Grantee of a rent free inam—Whether tenant within the meaning of section 20 clause (3).

A grantee of a rent free inam in a zemindary is not a tenant within the meaning of the term in S. 20, cl. (3) of the Madras Survey and Boundaries Act of 1897.

The desirability of amending the clause suggested

* C. R. P. No. 517 of 1920.

15th September, 1921.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decree of the Court of the District Munsif of Kanigiri in Small Cause Suit No. 1051 of 1919.

B. C. Seshachala Aiyar for *A. Krishnaswami Aiyar*, vakil for the Petitioner,

Ch. Raghava Rao, vakil for the respondent.

The Court (Spencer and Ramesam, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH.

Spencer, J.—The plaintiff is the Rajah of Venkatagiri who sues to recover road and railway cess and survey charges from an inamdar having an inam within his estate.

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The District Munsif has given him a decree for the road and railway cess and dismissed the suit in respect of the other item on the ground that it is cognizable by a Revenue Court only.

The Madras Survey and Boundaries Act (IV of 1897) provides for the recovery of a proportionate part of the cost of the surveys of estates from the occupants of the lands surveyed.

S. 20, cl. 3 declares :—"The amount so apportioned shall be recoverable by the proprietor from the tenants concerned in the same manner as if it were an arrear of rent due by a tenant to his landlord."

In interpreting the meaning of this clause the District Munsif has committed two errors. First he states that this clause has the effect of creating the relationship of landholder and ryot between the Zemindar or proprietor and the person from whom the amount is recoverable. Secondly he observes that arrears of rent due by a tenant to his landlord are clearly recoverable only by a Revenue Court.

The first statement imports the very technical significance of the word 'ryot' as defined in the Madras Estates Land Act into the word 'tenant' as used in the Survey and Boundaries Act and implies that the two words are synonymous.

A tenant ordinarily means a person who holds land under a landlord. But a ryot is a person who holds for the purpose of agriculture ryoti land in an estate on condition of paying rent. 'Rent' and 'ryoti land' have each a special meaning which is defined in S. 3 cl. 11 and 16 of the Madras Estates Land Act.

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The Munsif's second statement overlooks S. 19 of that Act and ignores the fact that quit-rent, house-rent and many other forms of rent are recoverable in ordinary Civil Courts.

The respondent's vakil has attempted to support the District Munsif's judgment on other grounds.

He argues first that as the word 'ryot' does not occur in S. 77 (i) of the Madras Estates Land Act or in the last portion of S. 3, cl. 11 (a) which includes under the definition of rent "money recoverable under any enactment for the time being in force as if it were rent", therefore it was intended to include such money from whomsoever it might be recoverable. I have no doubt that the words 'by a ryot' in the beginning of Clause 11 (a) governs the whole clause. If this was not the intention of the framers, I should expect to find in this clause something of the nature of a description of the class of persons from whom money payable as rent under other enactments is recoverable.

The next argument is that, as S. 164, cl. 3 of the Estates Land Act declares that when a survey is made and a record-of-rights is prepared under Chapter XI the survey shall be made under the Madras Survey and Boundaries Act, therefore the expenses are recoverable under the first named Act. The answer is that the preparation of a record-of-rights is something very different from a survey. S. 180 provides only for the recovery of the expenses of preparing a record-of-rights as if they were arrears of land revenue. It says nothing about the mode of recovering the cost of survey, which consequently is governed by the provisions of Chapter IV of the Survey and Boundaries Act.

The last argument is that as this inam is held free of any rent to be paid to the proprietor, therefore the inamdar is not liable to contribute any part of the costs of the survey.

For the purposes of this argument it is necessary to hold that a person who occupies land under a landholder free of all rent is not a 'tenant'.

In this connection, it is noticeable that in the definition of 'tenant' under the Local Boards Act (Madras Act V of 1884) all persons who occupy land under a landholder, whether they pay rent or not, are comprised *vide* S. 3, Clause (xxvii) of Madras Act V of 1884. Also that in the Bengal Survey Act of 1875 it is specially provided in S. 17 that rent-free lands are to be deemed to form a part of the tenure within the local bound-

aries of which they lie, although there is no such provision in the Madras Act. It is also worthy of notice that the Rent Recovery Act VIII of 1865, which was the Act which governed the relation of the landholders and tenants in this Presidency at the time when the Madras Survey and Boundaries Act was enacted in 1897, defined the term 'tenant' as including all persons who were bound to pay rent to a landholder. But this definition was expressly qualified by the reservation that it was for the purpose of that Act only.

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I am of opinion that the word 'tenant' in the Madras Survey and Boundaries Act has a wider significance resembling the definition in the Local Boards Act, and that it includes all occupants of land in a Zamindari estate upon which peishcush is paid to the Government. I need only refer to the derivation of the word from the Latin *tenere* 'to hold' and to the definitions in the dictionaries of Wharton and Webster of tenant 'tenancy,' 'tenure' and 'tenement.' In *Lakshminarasimham v. Pantulu v. Sree Sree Ramiachandra Maradaraja Deo* ¹ an intermediate landholder is spoken of as a tenure-holder, and a tenure-holder, is a tenant in the widest sense of the word. S. 20 of the Act does not say that survey charges are to be collected by proprietors along with the rent, but it provides that they are recoverable *as if they were arrears of rent*. Thus it is no answer to the landlord's demand upon a tenant in his estate to pay an amount to which the law gives the semblance of rent to urge that he is not liable to pay rent in any other form.

In this view I think that the Munsif was wrong in declining to adjudicate on the claim for survey charges, and as there was no dispute in the trial Court as to the correctness of the amount claimed, that the plaintiff should be given a decree for the amount claimed by him under both heads and for costs thereon.

As my learned brother differs from me on the last point of law and as there is a conflict between the decisions in *Narayanasami Reddi v. Osuru Reddi* ² and *In re Karri Venkanna Patrudu* ³ upon the question whether the opinion of the senior Judge should prevail when the Judges composing a Bench hearing Civil Revision Petitions in the exercise

1. (1913) I. L. R. 37 M. 319.

2. (1901) I. L. R. 25 Mad. 548.

3. (1915) 18 M. L. T. 591.

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of powers conferred by S. 115 of the Civil Procedure Code and S. 25 of Act IX of 1887 differ on a question of law, we refer under R. 2 (1) of the Appellate Side Rules, the question "whether the word tenant in S. 20, clause 3 of Madras Act IV of 1897 includes the grantees of a rent-free inam in a Zamindari?" for determination by a Full Bench.

Ramesam, J. :—This is a revision petition by the plaintiff against an order of the District Munsif of Kanigiri in a suit to recover roadcess, railwaycess, and survey charges from the defendant who owns an inam within the plaintiff's Zamindari. The District Munsif gave a decree for the cesses but, holding that he had no jurisdiction over the claim relating to the survey charges, dismissed the plaintiff's suit. He also expressed an opinion, without recording it as a finding binding on the parties, that the plaintiff is not entitled to recover the survey charges.

It is common ground that the inam is a personal inam held free of any payment to the Zamindar. Neither the petitioner nor the respondent is able to state the nature of the respondent's inam, (*i. e.*,) whether it is an enfranchised inam or an inam included in the assets of the plaintiff's Zamindari at the time of the Permanent Settlement. But, having regard to the fact that the plaintiff obtained a decree for roadcess and railwaycess—even though the inam is held free of rent—I think it must be an inam included in the Zamindari. On this footing the case has been argued on both sides and I accordingly deal with it.

The plaint does not mention the specific ground on which the plaintiff claims to recover the survey charges. In the Court below, it was based on S. 20 of Madras Act IV of 1897. Before us not only has this ground been reiterated but also the plaintiff relied on S. 70 of the Contract Act. The latter contention has not been raised in the Court below or even in the grounds of the petition. I am also of opinion that it is unsustainable. Considering the claim as based on S. 20 of the Survey and Boundaries Act, the District Munsif held that the Estates Land Act bars the suit. S. 189 of the latter Act bars the jurisdiction of the Civil Courts if a suit or application lies under it in a Revenue Court for recovering the amount. Mr. Raghava Rao for the respondent contends that a suit lies under S. 77 (i) of the Act (See item 8 of Schedule A to the

Act) to recover rent, which, as defined in S. 3 (11) (a) includes "money recoverable under any enactment as if it was rent." Under S. 20 of the Survey and Boundaries Act, the survey charges are recoverable from the tenant concerned, as if it was rent.

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But, in this case, it cannot be said that the defendant is a tenant. Even assuming that the grantee, under an absolute grant, of an inam included in a Zamindari is an intermediate landholder within the meaning of S. 73 of the Local Boards Act (Madras Act V of 1884) as to which I feel some doubt, it is difficult to describe him as a tenant. The land having become his own, he does not hold it of or under the Zamindar. It is significant that there is no section in the Madras Survey and Boundaries Act similar to S. 17 of the Bengal Act (of 1875).

In my opinion, therefore, the survey charges are not recoverable from the defendant as if it was rent within the meaning of S. 3 (11) (a) of the Estates Land Act—apart from the consideration that the latter part of sub-clause 1 (a) S. 3 (11) should be construed *ejusdem generis* with the former part and covers only monies recoverable from a ryot, which certainly the defendant is not.

The suit therefore lies in a Civil Court. The reasoning involved in the above conclusion incidentally disposes of the merits of the plaintiff's claim *i.e.*, he is not entitled to recover. On this latter ground, the Revision Petition should be dismissed with costs.

My learned brother and myself differ in our opinion. There is a conflict between *Narayanasami Reddi v. Osuru Reddi* ¹ and *Karri Venkanna Patrudu Inre* ² as to whether S. 98 of the Civil Procedure Code or Cl. 36 of the Letters Patent should apply. Under these circumstances, I agree to refer the question of law (as stated by my learned brother) to a Full Bench under R. 2 (1) of the Appellate Side Rules of Practice.

B. C. Seshachala Aiyar for A. Krishnaswami Aiyar for the Petitioner. The term 'tenant' in the section is used in its widest significance and denotes any under tenure holder whether paying rent or not. In Stroud's Judicial Dictionary "tenant" is defined as one who holds land of another, as also in Wharton's Law

1 (1901) 1 L. R. 25 M. 548.

2. (1915) 18 M. L. T. 591.

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Lexicon. So far as the Venkatagiri Zemindari is concerned, it is clear, that the right of resumption of the inam is in the zamindar. Further, the zamindar could claim any minerals that may be discovered in the inam land. These rights in respect of the property are still outstanding in the zamindar. The inamdar is therefore not full owner. He holds, under a derivative tenure. For these reasons he may be properly described as tenant.

S. 20 sub-section (1) also shows that the incidents of the charge is on the land. It is immaterial whether any rent is paid in respect of the land or not. It is also reasonable to suppose that the legislature meant to impose liability for survey charges, on all persons who may have the benefit of the survey.

The provisions of the Local Boards Act show that the liability before road cess for the benefit derived on account of roads, is to be laid on inamdars who do not pay any rent to the land-holder. The definition of the word tenant in the Bengal Tenancy Act, S. 3 and the Bengal Surveys Act S. 17, show that tenant is capable of the wide meaning contended for.

The special definition in S. 3 of the Local Boards Act of the word tenant, indicating that it means one who holds lands rent free was necessitated by reason of the charge for road cess depending on the amount of rent paid. In the case of survey, the incidence is upon the land, and no specific reference to rentfree lands was necessary.

T. M. Ramaswami Aiyar for *Ch. Raghava Rao* for the respondent.

The references to the meaning of the word 'tenant' as expressed in English Law books ought not to be taken as a guide in interpreting an Indian Act. The Rent Recovery Act, which was in force at the passing the present act, defines tenant, as one paying rent.

(*The Offg. C. J.* That is for the purposes of that Act).

I rely on the special definition in the Bengal Surveys Act and the Bengal Tenancy Act and the Local Boards Act, as showing that where the legislature meant to give a wide meaning, it made the same clear.

Again S. 20 (3) 'says' the survey charges may be recovered from the tenants concerned in the same manner as if it were an arrear of rent payable by a tenant to his landlord.

This shows that by tenant is meant only a person who pays rent to his landlord.

B. C. Seshachala Aiyar in reply.

The clause last referred to only provides for the manner of realising the charges *viz.*, as if it were rent. This does not mean that if the tenant is a person who does not pay rent, the charges cannot be recovered. If the expression used were, 'shall be recovered along with the rent', then it may lead to the inference, that the tenant must be one who pays rent. There may be some force in the argument of the other side, if the expression were "shall be recovered in the same manner as if it were an arrear of rent payable by the tenant to his landlord." The provision relates only to the manner of enforcement of the payment and to what all legal rights the landlord has as against a tenant.

The Court expressed the following

Opinion :—The Officiating Chief Justice.—The question referred to us is this.

"Whether the word tenant in S. 20 clause 3 of Madras Act IV of 1897 includes the grantees of a rent free inam in a Zamindari"

Clause (3) referred to runs thus :—

"The amount so apportioned shall be recoverable by the proprietor from the tenants concerned in the same manner as if it were an arrear of rent due by a tenant to his landlord."

It will be seen that the clause contains the words "tenants" and "tenant." The reference speaks of "tenant" : but I feel no doubt, that the word of which our interpretation is desired is the word "tenants" preceding the word "concerned."

On general principles I should much like to adopt Spencer, J.'s interpretation. There is no reason why the holder of a rent free Inam should not contribute equally with his neighbour, a ryot paying rent, to the cost of the survey, which is for the benefit of both. And S. 10 which governs the case of Government land, and speaks of the registered holder would apparently affect Inamdar equally with the ryot. But we have to interpret the section as it stands : and I am reluctantly forced to the other view.

It is not of much use referring to other Acts in which the term tenant is defined : we have not been referred to any Act in which the word tenant is used without special definition.

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and in which it has been held to cover a person who is not liable to pay rent. Nor do I feel justified in placing much reliance on English definitions. What seems to me an insuperable obstacle to the acceptance of the broad interpretation favoured by Spencer, J. is the occurrence of the word "tenant" near the end of the clause. Here it clearly means a person who holds land subject to the payment of rent : and I find it impossible to hold that the Legislature used the word tenant (or tenants) in two different senses in the same clause and in such close juxtaposition.

No doubt the charges have to be apportioned, under clause (1) of the section among all the lands surveyed : but it does not follow that a share is recoverable in each case : and it is only clause (3) which makes it recoverable under the Act.

As the learned vakil for Respondent points out, a provision of law for the recovery of money has to be strictly construed. I must answer the question in the negative—merely adding that it is worth consideration whether the Act should not be amended in this respect.

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Kumaraswami Sastri, J. :—I agree. The word "tenant" ordinarily means a person who holds lands or buildings of another in consideration of a premium paid or rent either in money, kind or service. So far as I am aware this is the sense in which the term is used in both the local and imperial Acts. Wherever a different or extended meaning is intended the legislature has taken care to define the word tenant so as to make it capable of including persons who in the popular sense would not be called tenants or who hold lands absolutely. For example in the Local Boards Act (Madras Act V of 1884) tenant is defined as including "all persons who whether personally or by an agent occupy land under a landholder or an intermediate landholder and whether or not they pay rent to such landholder or intermediate landholder ; as the case may be." This is so far as I am aware the only Madras Act where the word tenant is used in a wide sense so as to include persons not paying rent. In the Transfer of Property Act, the Rent Recovery Act, and the Estates Land Act, tenancy implies the holding of land on payment of rent or premium.

I do not think it can be said that a grantee of a rent free inam is a tenant of the Zamindar. He is the owner for all practical purposes and it will be doing violence to the plain

meaning of the word 'tenant' to say that he is a tenant of the owner of the estate.

I do not think that the English law as to land tenures affords much help in construing the word tenant in Indian Enactments. Even an absolute owner of land is spoken of as a tenant in fee simple. It would I think lead to many anomalies if we were to hold that every grantee of land in India is a tenant and it is clear that the legislature in dealing with landlords and tenants did not ordinarily depart from the ordinary and popular meaning of the word tenant.

It has been argued that the survey of the estate by the Zemindar under the provisions of the Survey and Boundaries Act benefitted the inamdar just as much as the tenants and there is no reason for making the tenant liable to bear a share of the expense and not the inamdar. This is a good reason for the legislature making the inamdar liable by a definition similar to that in the Local Boards Act of 1884 which was before the legislature when it passed the Survey and Boundaries Act in 1897 or for a provision similar to the Bengal Survey Act of 1875 where rent free lands are to be deemed to form part of the tenure within the local boundaries of which they are included. It is a rule of construction that ordinary terms and expressions are to be construed as they are understood in common language and that the obvious and popular meaning of the language should as a general rule be followed, and that statutes imposing a burden ought to be strictly construed. I do not think it is a sufficient reason to give the word tenant an extended sense simply because a person would otherwise escape a liability especially when the legislature has in other enactments passed prior to the Surveys Act taken care to make such persons liable by using apt words. It is a question for the legislature whether the Act should not be amended.

Turning to the section itself clauses 1 and 2 provide for the apportionment among the lands which have been surveyed the whole or any specified portion of the cost of such survey and clause 3 enacts that "the amount so apportioned shall be recoverable by the proprietor from the tenants concerned in the same manner as if it were an arrear of rent due by a tenant to his landlord." The object was to enable the landlord to take advantage of the remedies open to him for the recovery of rent and the clause contemplates cases where rent is payable by

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the party liable. The word tenant in the latter portion of the sentence means a person who pays rent to the landlord and there is no reason to give the word tenant occurring a few words before a different meaning.

I would answer this question referred to us in the negative.

Odgers, J.—I agree. The question referred to us is whether the word tenant in S. 20 (3) of Madras Act IV of 1897 includes the grantee of a rent free inam in a Zemindari. The reference is the result of a difference of opinion between Spencer and Ramesam, JJ. The clause runs thus:—"The amount so apportioned shall be recoverable by the proprietor from the tenants concerned in the same manner as if it were an arrear of rent due by a tenant to his landlord". Spencer, J. held that the word "tenant" in the clause in question had a wider meaning than "lessee" and corresponds to an occupier under any title on the analogy of the use of the word in English Law in combinations such as 'tenant in fee', 'tenant for life', 'tenant for years', 'Joint tenant' etc. The learned Judge draws attention to the definition of tenant in the Local Boards Act S. 3 (xxvii), Madras Act V of 1884 where it includes all persons who occupy land under a landholder or an intermediate landholder, and whether or not they pay rent to such landholder or intermediate landholder. Reference may also be made to Ss. 64 (ii) and 73 (third clause) of the same Act. It is however to be noted that S. 3 begins thus. "In this Act unless there is something repugnant to the subject or context"; the definition is therefore confined to the Act. In the Bengal Survey Act (V of 1875) S. 17 it is enacted that "all lands held without payment of rent, not being entered on the Collector's Register of revenue—free tenures of the district, shall, for the purposes of this Act, be deemed to form a part of the tenure within the local boundaries of which they may be included". This does not define tenant and restricts the above definition to the purposes of the Act. It does not appear to me that any positive inference can be drawn from the provisions of other Acts on distinct subjects. No instance occurs to me and none was quoted at the bar of the use in Indian enactments of the word 'tenant' in the English real property sense—a sense derived from the history of the development of tenure in the feudal law which gradually displaced the old allodial holdings. In this case there is admittedly no relationship of landlord and

tenant and it was not argued that the inamdar holds of or from the proprietor in any manner. For the appellant reliance was placed that the first two clauses of S. 20 of Act IV of 1897 throw the incidence of the cost on the lands not on the individual who is to pay and who is only referred to in the third clause.

There seems no reason either in law or equity why a holder of a free inam should not for the purposes of the Act be exactly in the same position as a tenant paying rent, but we can only interpret the language of the legislature as we find it. On the other hand the use of the word 'tenants' and a 'tenant' within a line of each other in the same clause is pointed to as suggesting the improbability of the same word being used in two different meanings. It is possible of course to say that the latter use of the word is not only illustrative of the manner in which the charge is to be recovered from the individual concerned; if so, the collocation is to say the least unfortunate and in the absence of authority as to the use of the word 'tenant' in Indian Enactments in the English Law sense, I must reluctantly hold that the word 'tenants' is confined to those who pay rent to the proprietor. I would therefore answer the reference in the negative.

Reference answered in the negative Petition dismissed.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE SADASIVA IYER AND MR. JUSTICE SPENCER.

Doorvas, J. Subbayyar and another ... *Appellants* (Defendants.)*

v.

The Firm of K. M. Subbarayalua Iyer
and son, Madura, by managing
partner K. M. S. R. Kuppuswami
Iyer

... *Respondents (Plaintiffs.)*

Evidence Act—S. 92—Absolute unconditional written promise—Contemporaneous agreement having the effect of converting it into a conditional defeasible one—Oral evidence of—Admissibility.

The appellants contracted to purchase from the Respondents 50 bales of yarn manufactured by the Madura Mills and actually took delivery of 6 bales. Owing to a fall in prices in the market the appellants were unwilling to receive the remaining 44 bales on the terms agreed upon. The contract was thereupon can-

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called on the condition that appellants paid Rs. 5,000 to the respondents to make good their losses upon their contract with the Mills. These Rs. 5,000 were included in a larger sum of Rs. 10,800 which represented the aggregate amount found to be owing by the appellants to the respondents on a settlement of accounts, and an unconditional promise to pay Rs. 10,800 to respondents order on demand was written in the appellant's ledger kept by the respondents and was signed by the appellants. In a suit based on the accounts, held, that oral evidence was inadmissible of a contemporaneous agreement that, in the event of the Mills consenting to cancel their contract with the respondents, the appellants should be excused from liability to pay Rs. 5,000 to the respondents. Such an agreement would have the effect of converting the absolute unconditional promise into a conditional defeasible one.

Appeal against the decree of the Court of the Subordinate Judge of Madura in Original Suit No. 66 of 1919.

C. V. Ananthakrishna Aiyar for appellants.

V. V. Sreenivasa Aiyangar and *T. Krishnaswami Aiyangar*

for respondent.

The Court delivered the following

Spencer, J.

Judgments:—*Spencer, J.* :—The appellants, who belong to a trading family, contracted to purchase from the respondents, a similar firm, 50 bales of yarn manufactured by the Madura Mills and actually took delivery of 6 bales. Owing to a fall in prices in the market the appellants were unwilling to receive the remaining 44 bales on the terms agreed upon. The contract was thereupon cancelled on the condition that appellants paid Rs. 5,000 to the respondents to make good their losses upon their contract with the Mills. These Rs. 5,000 were included in a larger sum of Rs. 10,800 which represented the aggregate amount found to be owing by the appellants to the respondents on a settlement of accounts made on February 2nd 1919, and an unconditional promise to pay Rs. 10,800 to respondents' order on demand was written in the appellant's ledger. (Ex. A.) kept by the respondents and was signed by the appellants.

At the trial in the Sub Court the appellants sought to prove by oral evidence that there was a contemporaneous agreement, that in the event of the Mills consenting to cancel their contract with the respondents, the appellants should be excused from their liability to pay Rs. 5000 to the respondents.

The Subordinate Judge refused to admit such evidence, holding that to do so would be tantamount to admitting parol evidence of an agreement in defeasance of the written contract contained in Ex. A which was an unconditional contract to pay Rs. 5,000 on demand.

He held that the evidence sought to be admitted was made inadmissible by S. 92 of the Indian Evidence Act. He further held that the letter (Ex. II) written on the same date as the promise to pay in Ex. A did not amount to a written agreement varying the terms of the first agreement.

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Mr. Ananthakrishna Iyer argued that the evidence that was excluded was evidence of a separate oral agreement as to a matter on which Ex. A was silent and which was not inconsistent with its terms. He drew our attention to the case of *Matabhoy Mulla Essabhoy v. Mulji Haridas* as being an instance of the application of proviso (2) of S. 92. Their Lordships of the Privy Council in that case went into the evidence observing that it would not be satisfactory to decide against the defendant on a view which might have been obviated by a mere amendment of the pleadings. So in this case I have considered whether if the respondents' suit had not been based on the accounts but had been brought to recover damages on account of the appellant's breach of contract in respect of the 44 bales which they refused to receive, it would have been open to them to plead in mitigation of the damages due upon their breach of contract that the respondents had not suffered to the extent claimed by them owing to the Madura Mills having excused them from their liability to receive the remaining bales from the Mills. After full consideration I have come to the conclusion that the result would be the same. When the promise in Ex. A to pay Rs. 10,800 to respondents' order on demand was signed, there was an unconditional agreement to pay Rs. 5000 as liquidated damages for the cancellation of the order for the remaining 44 bales. No doubt Ex. A is not a very formal document and there are no calculations to show how the figure Rs. 5000 was arrived at. But on the strength of the promise to pay on demand, the respondents might have called on the appellants to pay the sum of Rs. 10,800 the next minute after they had signed Ex. A, and it would then have been inconsistent with the unconditional nature of that promise to set up a contemporaneous undertaking that the respondent would repay the sum of Rs. 5000 paid as compensation in the event of of the Mills allowing them to countermand their order, as to do so would be to destroy the finality of the settlement then

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made which was irrespective of the respondent's liability to the mills. In the Respondents' letter Ex. I there is no acceptance of the proposal in Ex. II that the compensation should be returned if the Mills were prepared to cancel the order for bales of quality Nos. 50 and 44. In *Matabhoy Mulla Essabhoy v. Mulji Haridas* ¹ the separate oral agreement that the money paid on December 23rd 1907 should be treated as a prepayment in lieu of the advance due on January 30th 1908, and that in satisfaction of the promissory note of December 23rd the payee should give the holder an acknowledgment of the receipt of the instalment due on the later date was held to be an agreement which could be proved under proviso (2) to S. 92. There the oral agreement was quite distinct from the agreement under the promissory note and not inconsistent with it. The facts of the case before us are more analogous to those in *Hitchings and Choulthurst Company v. Northern Leather Company of America and Doushkess* ² where Bailhache, J. held that an oral agreement that the defendant would not pay if the goods supplied to his Company should be unequal to sample was an agreement in defeasance of the contract to pay contained in the promissory note, and evidence to prove it was inadmissible.

In *Ramjibun Serowgy v. Oghore Nath Chutterjee* ³ there was an attempt to set up an oral agreement restricting the absolute engagement in a promissory note to pay on demand and to bring it under proviso (3) which relates to agreements constituting a condition precedent to the attaching of an obligation under the contract, and it was ruled out as being an agreement to postpone the legal obligation to perform a promise which was absolute in its terms.

Although the alleged agreement in the present case not to enforce the absolute promise to pay on demand is not put forward as a condition precedent to the attaching of the obligation to pay, it is an agreement which would have the effect of converting an absolute unconditional promise into a conditional defeasible one.

The other cases cited in the arguments are not of much assistance. *Goseti Subba Rao v. Varigonda Narasimham* ⁴ is an authority on the application of proviso (4). *Jnanendra Mohan*

1. (1915) 1 L. R. 89 Bom. 399.

2. (1914) 3 K. B. 907.

3. (1897) 1 L. R. 25 Cal. 401.

4. (1903) 1 L. R. 27 Mad. 368.

*Chowdhury v. Gopal Das Chowdhury*¹ is an authority on S. 91. *Kamala Sahai v. Babu Nundan Mian*² deals with an agreement dehors S. 92 altogether, as it provided for the discharge of a debt secured by a mortgage deed by means of putting the mortgagee in possession and letting him enjoy the profits of the mortgaged property. *Jagatnand Misser v. Nergan Singh*³ simply laid down that evidence of part performance of a contract negatived a plea that there was an oral agreement constituting a condition precedent to the contract becoming enforceable.

I think that the appellants' contentions are not acceptable and that the appeal should be dismissed with costs.

Sadasiva Iyer, J.:—I entirely agree both with the conclusion of my learned brother and with his reasons for arriving at that conclusion.

A. S. V. ————— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE OLDFIELD AND MR. JUSTICE RAMESAM.

C. Kuppuswami Mudaliar ... *Appellants * and Petitioners (Plaintiffs and defendants 1 to 4).*
v.

Y. Subramaniam Chettiar ... *Respondents in the appeal (Plaintiffs and defendants 5 and 6).*

C. P. C. O. 40, R 1; S. 92—*Scheme Suit for temple—Receiver—Appointment pending suit—Jurisdiction—No prayer for removal of trustee—Trustee appointed by Temple Committee—Effect.*

In a suit under S. 92 C. P. C., though there is no prayer to remove the trustee, the Court has power to supersede him and appoint a receiver during the pendency of the suit, notwithstanding that the trustee was appointed Manager by the Temple Committee and was only removeable after regular enquiry.

Appeal against the order dated 30th April 1921 of the Court of the Subordinate Judge of Madura in I. A. No. 180 of 1921 in O. S. No. 63 of 1921 and Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to pass orders directing that further proceedings in the matter of the appointment of receiver in O. S. No. 63 of 1921 on the file of the court of the Subordinate

A. A. O. No. 206 of 1921 and C. M. P. No. 1408 of 1921.

11th August 1921.

1. (1901) 8 Cal. W. N. 928.

2. (1909) 11 Cal. L. J. 39.

3. (1881) 1 L. R. 16 Cal. 435.

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Judge of Madura be stayed pending disposal of Civil Miscellaneous Appeal No. 206 of 1921, preferred to the High Court against the order appointing receiver in the said O. S. No. 63 of 1921.

T. Raygachariar, T. V. Gopalaswami Mudaliar and T. Nallaswami Pillai for appellants.

T. R. Venkatrama Sastriar, K. V. Krishnaswami Aiyar, A. Krishnaswami Aiyar, N. Swaminatha Aiyar, K. Rajah Aiyar, K. Balasubramania Iyer, T. M. Ramaswami Aiyar and V. Ramaswami Aiyar for respondents.

The Court delivered the following

Oldfield, J.

Judgments :—*Oldfield, J.* :—We have heard argument at considerable length on the facts and law involved in this appeal. But, as the majority of the issues raised will require consideration at the trial of the suit by the Lower Court, we enter on no detailed discussion of them.

There is, we think, no doubt that the Lower Court had power to supersede 1st defendant, notwithstanding that he was appointed Manager by the temple Committee and was only removeable after regular enquiry. Such action was approved in *Veeragava Thatha chariar v. Krishnaswami Thatha chariar* in similar circumstances against a trustee and manager, who was no doubt hereditary but who also would be removable only in the same way.

As regards the facts we have been taken carefully through the history of 1st defendant's incumbency and in particular of the last ten days, during which the important Chithrai festival should have been celebrated, and in our opinion it is just and convenient in the interests of the public, whom the plaintiffs represent, and of the institution that the immediate management should be in other hands, and, should, so far as the circumstances permit, be under the supervision and control of the Court during the pendency of the suit.

We therefore dismiss the appeal and the connected petition, except that we add to the lower Court's order appealed against the provision already made in our order of 11th May 1921 on C. M. P. No. 1618 of 1921 for the maintenance, subject to the Receiver's right and duty to consult the Court, when necessary, of his subordination to the Temple Committee.

Appellants will pay respondents' costs in the appeal.

Ramesam, J.—I agree. The case in *Veeraragava Thathachariar v. Krishnaswami Thathachariar*¹ shows that in a suit under S. 92 of the Code of Civil Procedure though there is no prayer to remove a trustee, a receiver might be appointed during the pendency of the suit. The reason is, that, in this class of suits, it is not merely the defendants' rights that are the subject of consideration by the Courts but the interests of a public institution of far greater importance than the defendants' rights. It may be that the power of a temple committee to remove a trustee appointed by them is limited but it does not follow that a court's powers over the trustee are similarly fettered. Having regard to all the facts placed fully before us, I concur with my learned brother in thinking that the receiver should continue to be in charge of the institution till the suit is disposed of. I agree with the order of my learned brother.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE OLDFIELD AND MR. JUSTICE RAMESAM.

S. N. Ragunathaswamy Iyengar

and others

...

*Appellants * (Defendants.)*

v.

S. Gopau Rao and others

...

Respondents (Plaintiffs.)

Civil Procedure Code, Ss. 47 and 50—Execution sale—Irregularity—Nullity—Legal representative not brought on record—Mortgage suit effect on rights of puisne mortgagee.

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Where a puisne mortgagee, being a party to a suit on a prior mortgage allows a decree to be passed directing the sale of the properties free of his mortgage, a sale duly and properly held in execution of the decree extinguishes the puisne mortgage and neither the puisne mortgagee nor his representatives can enforce it subsequently.

Sri Gopal v. Prithu Singh (2) Referred to.

If in the case aforesaid, the properties are sold in execution of the prior mortgagee's decree without bringing on record any body as the legal representative of the puisne mortgagee who died subsequent to the order absolute and before the sale, the execution sale does not affect the rights of puisne mortgagee. As against the legal representatives of the puisne mortgagee the execution sale is void and they can sue to enforce the mortgage without setting aside the execution sale.

Cases on the point reviewed,

* Appeal No. 377 of 1919.

1. (1919) 20 M. L. J. 638.

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2. (1902) I L R. 24 All 419.

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Appeal against the decree of the Court of the Temporary Subordinate Judge of Salem in O. S. No. 9 of 1919.

T. Rangachariar, K. Bhashyam Aiyangar and N. C. Vijayaragavachariar for 10 and 11 appellants.

T. Narasimha Aiyangar and A. Ganesa Aiyar for 1st respondent.

The Court delivered the following

Oldfield, J.

Judgments :—*Oldfield, J.* :—I agree with the judgment about to be delivered and have nothing to add, to it.

Ramesam, J.

Ramesam, J. :—The suit out of which this appeal arises was brought on foot of a mortgage-deed dated 3-11-1896 for the recovery of the mortgage amount, by an assignee from the heir of the mortgagee, Ayyasami Pillai. The main defence is that the mortgage was extinguished by reason of the decree in O. S. No. 11 of 1898 and the proceedings in its execution. That suit was based on a prior mortgage dated 17-3-1896 and Ayyasami was the 8th defendant therein. In his written statement (Ex. V c) he stated that he had no objection to the passing of a decree and prayed that the balance, after selling the property and paying off the amount due to the plaintiff might be paid towards his mortgage. The other defendants in that case originally contested the suit but afterwards filed a compromise petition (Ex. C) by which the amount to be decreed was determined and a compromise decree (Ex. D) was passed. The learned vakil for the respondent argued that Ayyasami was not a party to that decree. I cannot agree to this contention. His name appears in the cause title of the decree and the court was not even asked to strike his name out of the record. The suit cannot be regarded as still pending so far as he is concerned nor can it be said that it was dismissed as against him. It follows therefore that the decree directing the sale of the properties without reserving his right (*i.e.*) free of his mortgage (*Vide Sri Gopal v. Pirthi Singh* ¹) is a decree affecting him and is binding on him. If duly executed, it ought to extinguish his mortgage.

The property was sold on 9th July 1904 (Ex. VII); some time before the sale, (*i.e.*) on 6-1-1904, Ayyaswami died and his legal representatives were not brought on record. In these circumstances, the Subordinate Judge held that the sale could

not affect his interest. It is contended for the appellants that Ayyasami was a *pro forma* defendant and cannot be regarded as a judgment-debtor and it was not necessary that his legal representatives should be brought on the record. This contention is inconsistent with the main plea that he was a party to the decree and his mortgage, was therefore extinguished. A second mortgagee when impleaded in a prior mortgagee's suit is not a *pro forma* defendant. He can redeem the earlier mortgage by paying up the decree amount at any time before the sale. He can apply to set aside the sale under O. 21, R. 89 or 90. He can apply that the balance of the sale proceeds after discharging the prior mortgagee's dues may be paid to him. Though it is true that, what was mortgaged to the plaintiff in that suit was the mortgagor's property as it stood on 17-3-1896 and therefore, the plaintiff could get the property sold free of subsequent encumbrances the plaintiff could do this only by a properly constituted suit and proceedings in execution *i.e.*, by impleading the puisne mortgagee or his representatives and the interest of the mortgagor which the prior mortgagee would then be entitled to sell may be said to comprise, at the time of the sale, the interest of the subsequent mortgagees and the mortgagor's equity of redemption. I am therefore of opinion that Ayyasami was a judgment debtor in O. S. No. 11 of 1898.

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It is next contended that the sale is not a nullity. It is said (1) that the proceedings in the execution of a mortgage decree after the order for sale is passed (and the proceedings in the execution of a money decree after the order for attachment is made) are administrative and (2) that the irregularity in not bringing the legal representatives of the judgment-debtor on the record will only make the sale voidable and as it had not been set aside within thirty days of the sale (Article 166 Limitation Act) or within one year (Art. 12) the sale stands, not being a nullity. It may be that some proceedings in execution after an order for sale is made do not amount to the "determination of any question within S. 47 of the Code of Civil Procedure, 1908" so as to amount to a decree, for the purpose of being appealed against (See *Sivagami Achi v. Subramaniya Iyer* ¹, and may be said to be "administrative" as opposed to "adjudicating" in the sense that they do not

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adjudicate a right but carry out some prior order, but they are none the less judicial proceedings in the sense that they are the proceedings of a court of justice and not of an executive authority and if not legally carried out, may be materially defective. This leads me to the next question as to the nature and effect of the defect in the proceedings.

S. 50 of the Civil Procedure Code (corresponding to S. 234 of the old Code) lays down that "Where a judgment debtor dies before the decree has been fully satisfied the holder of the decree may apply to the court which passed it to execute the same against the legal representative of the deceased." It is obvious that the word 'may' in this section is equivalent to 'shall', for except in the sense that the decree-holder may, if he chooses, drop the execution altogether, there is no option left to him and it is imperative on him to follow the procedure enjoined by the section, if he desires further execution. As it is opposed to all notions of justice to allow legal proceedings to be taken against an estate without there being some person in the record to represent the estate, one would suppose that such proceedings in execution taken without having the legal representatives of a deceased judgment-debtor on the record are void and do not amount to a mere irregularity. It is difficult to see how, for this purpose, any distinction can be drawn between the case of a judgment-debtor's death before the order for sale is passed and the case of a death after the order. The estate has to be represented on the record by some one interested in watching the proceedings until the sale is confirmed. I will now examine the cases on the point.

The case of *Malikarjun v. Narahar*¹ was very much relied on for the appellants but in my opinion does not help them. In that case the procedure laid down by the Code was followed. An application was made to bring the legal representatives of the deceased judgment-debtor on the record. The court received the application and did issue notice to the party named as the heir. "He contended that he was not the right person, but the court, having received his protest decided that he was the right person, and so proceeded with the execution. In so doing the court was exercising its jurisdiction. It made a sad mistake, it is true; but a court has juris-

diction to decide wrong as well as right" (Lord Hobhouse at page 347). These observations do not apply to the case now before us. The procedure laid down by the Code was not followed in this case. This is not therefore, the case of an erroneous decision, ruling, or exercise of discretion of the judge in a matter in which the court had jurisdiction. I think that the interest of Ayyasami was not represented in law or in fact in the proceedings in execution after 6—4—1904 and the sale of the property, so far as his interest was, sought to be affected by it, was therefore without jurisdiction and null and void (*Vide Khairajmal v. Daim* ¹ which is a case of the decree being itself void). But there is no substance in the distinction that, when the decree was duly obtained against the deceased judgment debtor, the sale in execution after a decree without the heir of the judgment-debtor properly on the record is not a nullity. This is clear from the case of *Rashid Un-nissa v. Mohamad Ismail Khan* ². *Vide also Paidanna v. Lakshmi Narasimha* ³ where it was held that execution proceedings obtained against a minor legal representative of a deceased judgment-debtor without his being represented by a proper guardian *ad litem* are void. A *fortiori*, a sale in execution carried out against a dead person (or no person) is void and should be regarded a nullity and has not got to be set aside. It seems to me that the decisions of Indian High Courts prior to 31 All. 572 (*i. e.*) (a) those in favour of the appellant such as *Sheo Prasad v. Hira Lal* ⁴, *Abdur Aba v. Dhondu Bai* ⁵ which while seeming to disapprove of 12 All. 440 are based finally on grounds not quite clear and (b) decisions like *Ramaswami v. Bagirathi* ⁶ and *Krishnayya v. Unnissa Begum* ⁷ (where Shephard, J. said that it was not a case of mere irregularity but the learned Judges in Letters Patent Appeal described the defect as a material irregularity causing substantial injury) which are rightly commented on by Mr. Rangachari the learned vakil for the appellants, as inconclusive, are not of much value. But the other Madras decisions cited before us *viz.*, *Grovez v. Administrator General* ⁸ and *Rayarappa Nambiar v.*

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¹. (1904) I. L. R. 82 Cal. 296, 315. (P. C.) 2, (1909) I. L. R. 31 All. 572.

³. (1914) I. L. R. 38 Mad. 1076.

⁴. (1889) I. L. R. 12 All. 440.

⁵. (1894) I. L. R. 19 Bom. 276.

⁶. (1883) I. L. R. 6 Mad. 180.

⁷. (1891) I. L. R. 15 Mad. 399.

⁸. (1898) I. L. R. 22 Mad. 119.

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*Malikandi Akath Mayan*¹ are decidedly against the appellants. The language of the learned Judges in these cases is clear and unambiguous. I agree with the remarks of Boddam, J. in 22 Mad. at p. 125 where he disagrees with 12 All. 440 (F. B.). It is said that Art. 12 of Limitation Act was not considered in those cases as the matter arose in execution and not in a separate suit. On the view taken by their Lordships in those cases viz., that the sale was a nullity, no such question could arise. I may add that, if the sale in pursuance of an order for sale against the judgment-debtor (when living) is not a nullity but only voidable, as contended by the appellants any attempt to set aside the sale must be made in execution and not by a regular suit and no occasion for the application of Art. 12 can arise. The cases in *Narayana Kothan v. Kaliyanasundaram*² which Boddam, J. described in 22 Mad. 119 as supporting his view) *Muhammad Rafi v. Muhammad Askari*³ *Seshagiri Row v. Hanumantha Row*⁴ and *Lala Ganpat Lal v. Bindbaasni Prasad Narayan Singh*⁵ are not cases of the judgment-debtor's death and need not be considered. As to the cases decided in Calcutta, in *Net Lal Sahoo v. Shaikh Kareem Buse*⁶ the heirs were parties to the proceedings in execution. In *Bepin Behari Bora v. Sasi Bhusan Batta*⁷ the sale was a sale under the Public Demands Recovery Act of the Bengal Code and may perhaps be distinguished on that ground. But it must be admitted that the manner in which the Madras cases were referred to at p. 768 supports the appellants. So far as the reference to 22 Mad. 119 is concerned, I would observe with great deference to the eminent Judges that decided 18 C. W. N. 766 that, though Boddam, J. concludes by saying that the sale should be set aside, there is no doubt as to what the learned Judges meant (Vide pp. 123-125) viz., that the sale should be declared void. In *Jagadish Bhattacharghee v. Bama Sundari Dasyi*⁸ (case of a money decree) Richardson, J. merely follows 12 All. 440; 19 Bom. 276, 23 Cal. 686 and Shamsul Huda, J. was content to follow 18 C. W. N. 766. The decision in *Mussamati Rukini v. Jodha Singh*⁹ might be also described as

1. (1914) 26 M. L. J. 267.

2. (1896) I. L. R. 19 Mad. 219.

3. (1916) 37 I. C. 433.

4. (1915) I. L. R. 39 Mad. 1031 and C. M. S. A. No. 37 of 1920.

5. (1920) 39 M. L. J. 108.

6. (1896) I. L. R. 23 Cal. 686.

7. (1914) 18 C. W. N. 766.

8. (1919) 23 C. W. N. 608.

9. (1913) 19 I. C. 120.

inconclusive but for the manner in which *Malkarjan v. Narhari*¹ was distinguished by the learned Judges. In my opinion, *Malkarjun v. Narahari* might have been distinguished on the ground that it was not, whereas the case before their Lordships, was a case of nullity.

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The distinction made between an application for attachment and an application for sale in *Sita Ramayya v. Gopala-krishnamma*² in the course of applying the decision in *Raghunath Das v. Sundara Dos Khatri*³ (a decision on O. 21 R. 22) cannot help the appellants. The application there was made against judgment debtor himself and no question arose as to the effect of S. 50 Civil Procedure Code which would certainly cover even all applications in execution after attachment. I therefore hold that the execution of the decree in O. S. No. 11 of 98 not being carried out so as to affect Ayyasami's interest, his mortgage is not extinguished.

The only other question is whether the payment of Rs. 250 on 15-2-04 is true. The evidence is all one way and I accept the finding of the Court below. The suit is therefore not barred.

In the result, the appeal fails and is dismissed with costs.

There is a memorandum of objections by the plaintiff. He objects to those portions of the judgment and decree which direct that the plaintiff should execute an indemnity bond for Rs. 3775, to be answerable to the reversioners of Ayyasami on the death of the 8th defendant. The reversioners are not parties to the suit. I do not think that the directions for the benefit of the absentee reversioners is justified. I agree with the plaintiff's contention and allow his cross objections with costs and direct that cl. (3) of the decree should be deleted.

Time for redemption is extended to 28-2-1922.

A.V.V.

Appeal dismissed cross objections allowed.

1. (1900) I. L. R. 25 Bom. 387,

2. I. L. R. 43 Mad. 57,

3. I. L. R. 42 Cal. 72 (P.C.)

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE OLDFIELD AND MR. JUSTICE RAMESAM.

Obiliseti Venkata Kristnaiah ... *Appellant* * (1st Deflt.)

v.

Atyam Subbiah and others ... *Respondents (Plaintiff and defendants Nos 2 to 5.)*

Venkata
Kristnaiah
v.
Atyam
Subbiah.

Hindu Law—Joint family—Debts—Borrowing by junior member—Trade—Liability of other members.

• Where a junior member of a joint Hindu family being in charge of a family borrows money for binding purposes, the other members of the family are liable to the creditor to the extent of their shares in the family properties.

Obiter.—The actual borrower as well as the manager of the joint family would also be personally liable for the debt.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Ellore in O. S. No. 14 of 1919 (Original Suit No. 02 of 1918 on the file of the court of the Subordinate Judge of Ellōre).

K. V. Krishnaswami Aiyar for *T. V. Muthukrishna Iyer* and *V. Suryanarayana* for the appellant.

P. Narayanamurthi and *P. Kamanna* for respondents.

The Court delivered the following.

Oldfield, J.

Judgments :—*Oldfield, J.* :—I agree with the judgment to be delivered by my learned brother and have nothing to add.

Ramesam, J.

Ramesam, J. :—The plaintiff sues as the assignee of one, Nunna Venkataratnam. His case is that the defendant's family, had, during the life-time of their father Jagannadham, two *Khatas* with the said Venkataratnam (1) in which Venkataratnam acted as a commission agent for the family and (2) the suit transaction in which Venkataratnam and the defendant's family were partners in paddy trade. In Venkataratnam's accounts, the first *khata* stood in the name of their father and manager and the second, in the name of the 2nd defendant. The 1st defendant contested the suit on the ground that the 2nd *khata* did not relate to a family transaction; but the Subordinate Judge decreed in Plaintiff's favour. The 1st defendant appeals.

The only point argued for the appellant is that the 1st defendant cannot be made liable in this suit, as there was no privity of contract between him and Venkataratnam even

though the debt was a family debt and the 1st defendant may be liable to his brothers in a suit for contribution.

The following facts may be taken as admitted or proved in the case. The defendants and their father were living together as a joint family until the father's death which happened about the end of 1915 or very early in 1916. Shortly after the father's death, there was a partition between the brothers. The suit transaction commenced in 1908. The accounts were settled on 22—10—15 and it was found that a sum of Rs. 36,496 and odd was due to Venkataratnam. This settlement appears both in the account books of Venkataratnam and in the accounts of the Defendant's family. In the former, it was signed by the 4th defendant (Ex. A.) The other transaction in the name of the father which is admitted to have been carried on for the family was settled on 15—10—15 and it was found that Venkataratnam owed Rs. 3721 and odd to the defendant's family. This amount was transferred to the suit account to the credit of the defendants on 17—1—16, after the father's death. The defendant's family ledger contained both the *khata*s—Ex. B relating to the suit *khata* and C, relating to the admitted family *khata*. There are day books corresponding to the ledger. The 1st defendant, while admitting that there are accounts kept by the family, says he never cared to look into them. He attended to the cultivation of the family lands; while the 2nd defendant, who was regarded by the father as a person of greater capacity than his brothers, looked after the family trade. The family had two shares in a rice mill—the shares standing in the 2nd defendant's name. The 2nd defendant settled the accounts relating to the dealings of the family with one Pulavarti Venkanna. He was also borrowing from the Madras Bank for the family purposes though all the members executed a security bond in favour of the Bank. Not only did the 1st defendant not repudiate the transfer of the amount in his father's *khata* to the suit *khata* but he adopted in Ex. D the result of the transfer as continued up to the date of the petition. In this petition he admitted the suit debt as a family debt. The reference in it, in the sentence "Until two years ago, Nunna Venkataratnam and we carried on paddy business jointly. There was loss to the extent of Rs. 10,000 for our share"—is obviously to the suit transactions and not to the *khata* in Jagannadham's name in which Venkataratnam was not a partner

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but only a commission agent and which did not result in a loss for the defendants. The irresistible inference is that the suit transactions was, from the beginning, one entered into on behalf of the family, being known to its manager, and carried on for its benefit—the understanding, from the beginning, being that the family will share in the profit or loss. It is not a case where a member carried on business separately, with his own funds, and for his own benefit and afterwards the family took upon itself, the debts he had incurred and hence, no question as to whether Ex. D amounts to a valid ratification in law arises. (*Vide Keighley Maxsted and Co. v. Durant* ¹).

It seems to me that, where a debt was incurred on behalf of the family though only a single member, not being a manager, deals with the creditor, the creditor being ignorant of the fact that the single member was acting on behalf of the family a suit is maintainable against all the members. In such a case the single member is the agent of the manager (and some or all of the adult junior members). This is the basis of Subramania Aiyar, J's judgment in *Krishna Aiyar v. Krishnaswami Aiyar* ². The dissenting judgments of Davies, J. (at pp. 601 and 607) were based on his view that the suit was based on the note only. At p. 601 he conceded that "had it been a bond that was sued on or had the suit been brought on the debt, of which the promissory note afforded evidence, other members of the first defendants's family might have been held liable as well as himself on the ground that the 1st defendant represented them." This sentence of Davies, J. gives the reply to the argument of Mr. K. V. Krishnaswami Aiyar the learned Vakil for the appellant who earnestly urged upon us the view that that decision proceeded on the ground that the 1st defendant in that case was the manager. He relied on the judgment of Sheppard, J. (at p. 605) and also referred to the following cases :—*Negendra Chandra Dey v. Amar Chandra Kundu* ³ *Baisnab Chandra Deo v. Ramdhan Dhor*, ⁴ *Pulikkavandy Ambalan v. Periyakaruppa Kone* ⁵ *Angad Singh v. Srinath Das* ⁶ *Govinda Nair v. Nanu Menon* ⁷ *Nachippa Chetty v. Dakshinamurthy Servai* ⁸ *Chinnai Chetty v. Tikkani Ramaswami Chetty* ⁹

1. (1901) A. C. 240.

2. (1899) I. L. R. 23 Mad. 597 at p. 600.

3. (1903) 7 C. W. N. 725.

4. (1906) 11 C. W. N. 139.

5. (1908) 2 I. C. 203.

6. (1908) 3 I. C. 403.

7. (1914) M. W. N. 782.

8. (1915) M. W. N. 217.

9. (1915) 31 I. C. 317.

Ayyasami Pillai v. Guruswami Naicken ¹ affirmed on L. P. A. in 32 M. L. J. 354. It is true that in some of these *Krishna Ayyar v. Krishnaswamy Iyer* ² was referred to as a decision relating to the dealing by a manager. But, I am of opinion that Sheppard, J. was merely meeting the objection of Davies J that the suit was based on the note and not on the debt and did not intend to lay and particular emphasis on the word 'manager' used by him. When a single member acts in his own name but really as the agent of the manager, the case is one of an undisclosed principal and the manager is bound. So far, it is an application of the Law of agency. In so far as the manager's acts bind the whole family it is the application of the Hindu Law relating to the manager and involves no extension of the ordinary rules of Hindu Law. Thus, it is a case of a combined application of the Hindu Law and the Law of Agency and involves no unjustifiable extension of either. In such a case the contracting member, and (with reference to the first class of S. 231 of the Contract Act), the manager may be personally liable but not the other members. This is the view taken in *Krishna Iyer v. Krishnaswamy Iyer* ² where, certainly none of defendants 2 to 9, was the manager. I hold, therefore, that the 1st defendant's share in the joint family properties is liable (but not his separate properties or his person.) The decree will accordingly be modified. Subject to the modification the appeal is dismissed with costs of 1st respondent.

A. V. V.

Decree modified.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE OLDFIELD AND MR. JUSTICE RAMESAM.

P. S. Narayana Aiyar ... Appellant* (3rd Defendant.)

v.

Biyari Bivi alias Kathon Bivi ... Respondents (Plaintiff and
and others Defendants Nos. 1 and 2.)

C. P. Code, S. 64—Attachment—Private alienation—Award—Effect of—Mahomedan Law—Dower—Charge—Rights of wife.

A decree on an award of arbitrators given pending an attachment is not equivalent to a private transfer within the meaning of S. 64, C.P.C., and holds good against claims enforceable under the attachment.

Under the Mahomedan law the lien in respect of unpaid dower attaches to the property of the husband in the possession of his widow or divorced wife.

* Appeal No. 184 of 1920.

8th September, 1921.

1. (1916) 3 L.W. 463.

2. (1899) 1 L.R. 23 Mad. 597.

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A wife whose marriage is subsisting cannot claim any such lien in respect of her dower.

Appeal against the Decree of the court of the Temporary Subordinate Judge of Madura in O. S. No. 14 of 1918 (Original Suit No. 111 of 1917 on the file of the court of the Subordinate Judge, Madura.

The Hon. The Advocate-General Instructed by Messrs. (Brightwell and Moresby) for appellants.

K. Rajah Aiyar, K. S. Vaikuntam Aiyar and M. Krishna Bharati for respondent.

The Court delivered the following

Judgment:—The decision appealed against gives plaintiff a charge for two lakhs of rupees on the properties purchased by 3rd defendant, appellant, at a sale held in execution of 1st defendant's money decree against 2nd defendant, after the dismissal of plaintiff's claim.

The nature and extent of Plaintiff's right over the properties depends on the effect of a series of transactions originating in the liability of the 1st defendant, her husband, for *mahar* settled at £22,500 when their marriage took place in 1884. This liability is referred to in Exs. E and F and is not disputed before us, although those documents are not registered and may not effect the security for its satisfaction, to which they refer. This attempt to provide security was due to 2nd defendant becoming indebted; and in 1909 he further gave Ex. A, undertaking (1) to repay to Plaintiff a loan taken for the discharge of his debts, within five years from the income of the properties, which had fallen to him as his share under the partition, Ex. G, and (2) to sell her at the end of five years those properties for two lakhs of the mahar debt or to give her possession thereof, apparently as security for that sum. This document also was unregistered and therefore was valid only as an agreement to sell. On this the loan was, as Exs. H series and K show advanced; but nothing was done in pursuance of the provision for sale or delivery and on 11th December 1914 the properties were attached by 1st defendant. 2nd defendant however in defiance of his obligations under Ex. A and the attachment gave a lease for three years, Ex. B, for an advanced rent of Rs. 7,500 to P. W. 1 and another; and this was followed within two months by a reference on the part of plaintiff and 2nd defendant to arbitrators of the differences, which

according to the muchilika, Ex. J, had arisen between them, the arbitration ending in an award, Ex. J-1 which was made a decree of Court, Ex. J-3. It is with the effect of Ex. J-3 that we are concerned, its terms being that (1) 2nd defendant should within one month execute a sale-deed conveying to plaintiff the properties referred to in Ex. A or that in case of his default, the court should execute one on his behalf, (2) he should borrow Rs, 7,500 from plaintiff, repay the lessee under Ex B the amount received from him and then put plaintiff in possession of the properties which, until he did so, should be charged with two lakhs of rupees for her benefit and (3) he should repay the plaintiff within two years another amount already borrowed on a pro-note.

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In pursuance of this the lease Ex. B was terminated and plaintiff alleges that she was put in possession of the properties, her claim was made and dismissed, and 3rd defendant purchased at the sale, which followed. In her suit plaintiff asked generally for a decree vacating the order on her claim and declaring that the properties were not liable to be sold. But the lower court refused the latter relief on the ground that she had not perfected her right by obtaining a sale-deed; and it is not suggested on her behalf that this refusal was wrong. The question is only whether the lower court was entitled to grant her a charge for two lakhs on the property.

The charge it allowed was not created by Ex. A. which was unregistered, and therefore it must be supported, if at all as created by Ex. J-3. That decree was however passed after the attachment of the property; and it is argued with reference to S. 64, Civil Procedure Code, that, as the award, which it embodied, resulted from the consent of plaintiff and 2nd defendant to a reference to arbitration, it must be regarded as a private transfer of the property attached or, consistently with plaintiff's case, of an interest in it and was void against 3rd defendant's claim, which is enforceable under the attachment. It is not necessary to consider whether a decree embodying an award can be so regarded, in case it is proved that the reference to arbitration was collusive and the whole proceedings a device to invest a private arrangement between the parties with the appearance of a public adjudication. For, the learned practitioners who appear for 3rd defendant, have expressly disclaimed any intention to attack the lower court's finding that the contrary was

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the case. And then in accordance with *Qurban Ali v. Ashraf Ali* ¹ and *Kasi Viswanatha Chettiar v. Ramaswami Alhitha Nadar* ² the former being a decision of a Full Bench and proceeding on general principle not on any of the particular facts before the court, we must hold that a decree such as Ex. J-3, which embodied an award is not a private transfer, which can be treated as void under S. 64.

Plaintiff has however still to establish that the charge she is claiming is created by Ex. J-3. The lower court held that she did so on the ground that, as her claim to two lakhs, as part of her *Mahar* was in fact accompanied by possession of the suit properties, she had under Mahomedan Law a lien on them and a right to retain possession until that *Mahar* debt was discharged. It referred in support of this to Mulla's principles of Mahomedan Law, 4th Edition, Rr. 206, 207 and before us, the dictum of Seshagiri Aiyar, J in *Abi Dhunnissa Bibi v. Muhammed Fathi-ud-din* ³ that "a Mahomedan wife has a lien over the property of her husband in her possession for unpaid dower," has been relied on. But this contention rests on a misapprehension, due perhaps to indiscriminate use by the learned author and the learned Judge just referred to, of the term "wife" to denote both a divorced wife and a widow, since the law recognises such a lien as that now claimed in both of these cases. We have not, however, been shown that the right of the wife to a lien before the marriage is dissolved, is recognized by any authority; and in fact the context of the learned judge's dictum with its references to "the estate of the deceased husband" and two cases, in which only a widow's possession of such an estate was in question, shows that he had no such extension of this well defined doctrine, as plaintiff requires, in mind. This failing, it is necessary to consider her claim, as it is put forward before us, with direct reference to the terms of Ex. J-3.

One term relied on provides that "defendant (here 2nd defendant) shall after paying the lessees and redeeming the lease, put the plaintiffs in possession of the properties covered by it and till then the properties shall be under a mortgage charge for Rs. 2, 00,000." This is the only provision for a

1. (1882) 1. L. R. 4 All. 219.

2. (1918) 36 M. L. J. 441.

3. (1917) 1. L. R. 4 Mad. 1026.

charge and in fact the decree directs elsewhere as regards the *mahar* generally that plaintiff is entitled to it during 2nd defendant's life-time, only when he pays it of his own accord, and it is therefore on this term if at all, that plaintiff can succeed. Reading as it stands, it provides for a charge to continue only until plaintiff is given possession, as she was shortly after Ex. J—3 was passed; and, if so, it had ceased to be operative before the present suit began and no claim to relief therein can be founded on it. Plaintiff however contents that the words "till then" cover, not only the contingency specified in their immediate context, but also the performance of the other obligation imposed on 2nd defendant in the preceding portion of the decree, the execution within a month of a sale-deed and further that this interpretation is in accordance with the award in the terms of which the decree is drawn up. The answer is firstly, that the words "till then," can most naturally be read in connection with the contingency, the transfer of possession referred to in the distinct clause, in which they stand, and that after that transfer, when plaintiff would be in enjoyment of the property, the right to a charge would be useless, since it would not assist her to obtain performance of 2nd defendant's remaining obligation, the giving of a sale deed, her remedy by execution being available. And secondly although it is true, that for some purpose, which is obscure, Ex J—2, the award provides in clause 9 (b) in accordance with plaintiff's contention for a charge "for a period extending from this day to the date of the completion of the said sale" we are not at liberty to import those words into a decree which is easily intelligible in itself and without them, which was passed at plaintiff's own instance against which she did not appeal and which had become final in its present form 3rd defendant made his purchase.

The grounds, on which plaintiff claims a charge, being unsustainable, the appeal must be allowed and her suit must be dismissed with costs in both courts.

A. V. V.

Appeal allowed.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUMARASWAMY SASTRI.

Kuppammal ... Accused in Calendar Case No. 7996 of 1921
and others on the file of the Bench of the Honorary
Presidency Magistrates, Egmore, Madras.

Kuppammal *In re.* Madras City Police Act—S. 71, cl XI—Applicability—Obstruction by Vehicles
animals if an offence—Essentials of offence—Intention—Necessity.

Clause XI of S. 71 of the City Police Act covers a case of obstructing a thoroughfare in any manner and is not limited to obstruction caused by vehicles and animals. In the case of obstruction by Vehicles and animals there is no question of intention; the act and obstruction caused by the act are sufficient. In other cases intention is necessary to be proved in addition to the obstruction.

Case referred for the orders of the High Court, under S. 432 of the Criminal Procedure Code by the President of the Honorary Presidency Magistrates Court, Egmore, Madras in his order dated 16th June 1921 and forwarded by the Chief Presidency Magistrate, Madras, in his letter R. O. C. No. 387 dated 1st July 1921.

This case coming on for orders as notice issued to the 5th accused was not served on him and the court holding that the hearing of the case need not be delayed for this reason, upon perusing the order of reference and also the letter of the Chief Presidency Magistrate and the records in the cases.

The Crown Prosecutor for the Crown.

The Court made the following

Order :—I think Cl. XI of S. 71 of the City Police Act covers a case of obstructing a thoroughfare in any manner and is not limited to obstruction caused by vehicles and animals. There is no reason to suppose that the legislature intended to permit all other kinds of obstruction and punish only obstructions by vehicles or animals. There is a semi-colon before the sentence "or in any way wilfully obstructs etc." In the case of obstruction by vehicles and animals there is no question of intention, the act and obstruction caused by the act are sufficient. In other cases intention is necessary to be proved in addition to the obstruction. These are questions of fact to be

determined by the Magistrate. The fact that Act III of 1889 contains clause 6 to S. 3 which deals with exposing goods for sale so as to cause obstruction which follows clause 5 which is similar in terms to clause XI of the City Police Act affords no guide to the interpretation of the City Police Act. Probably the legislature intended to place the matter beyond all doubt.

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I am of opinion that the accused will be guilty of an offence under clause XI of S. 71 of the City Police Act if the requisite intention and the fact of obstruction are proved.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE OLDFIELD AND MR. JUSTICE RAMESAM.

Vaddiparthi Narayanamurthy ... Appellant * (Plaintiff)

v.

Cadimsetti Appalanarasimhulu and
another ... Respondents (Defendants.)

Transfer of Property Act—Ss. 58 (2), 98—Usufructuary Mortgage—Anomalous mortgage—English Mortgage—Distinction—Text—Usufructuary mortgage with a clog on equity of redemption—What amounts to

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Where the material portion of a mortgage deed was to the effect :—"We have borrowed from you Rs 1,000. We have put you in possession of the 8 acres 25 cents of land comprising.....towards the yearly interest of Rs. 80-at 8 per cent and the taxes payable to sitkar. Whatever might be the profits received from the said lands in every year they shall be taken in payment of interest aforesaid and the taxes on the lands, you shall enjoy the profits from the said lands without having anything to do with the increase or decrease. You need not receive the said principal sum of Rs. 1000; even though we should pay you the same, within 5 years from the current year. It is settled that in case we should pay afterwards at one and the same time the said Rs. 1,000 on the 15th of Chirrai, Sudham of any year, you should give up our land to us. If the principal sum be not paid within 20 years from this date you shall treat and enjoy these lands as having been sold to you absolutely," Held that the mortgage was merely a usufructuary mortgage with a clog on the equity of redemption and neither an English nor an anomalous mortgage.

The mortgage does not cease to be usufructuary merely on account of the addition of a term providing for irredeemability within 5 years

Second Appeal against the decree of the District Court of Vazagapatam in A. S. No. 277 of 1918 preferred against the

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decree of the Court of the District munsiff of Yellamanchilli in O. S. No. 305 of 1917.

Y. Suryanarayana, for appellant.

A. Krishnaswami Aiyar, for respondents.

The Court delivered the following

Oldfield, J.

Judgments : *Oldfield, J.* :—The terms of Ex. A, the mortgage we have to construe, are given in the judgment of my learned brother, which I have had the advantage of reading ; they need not be repeated. Shortly the mortgage is usufructuary with conditions barring redemption (1) within five years and (2) after twenty years from its date. If there were only the second of these conditions, the case would be covered by the decision of the Full Bench in *Kandula Venkiah v. Donga Pallayya* ¹ the clog constituted by that condition on the equity of redemption being disregarded. The question is then whether, as defendants contend, the inclusion of the first condition deprives the document of its character as an usufructuary mortgage. As we hold it does not do so, it is not necessary to consider whether the second condition must receive effect as one of the terms of the mortgage with regard to S. 98 of the Transfer of Property Act.

If the condition postponing repayment of the mortgage money is regarded as intended for the benefit of the mortgagor, it will suspend only his liability to be sued, not his right to redeem before the date fixed, vide *Rose Ammal v. Rajarathna Ammal* ² and it clearly cannot affect the usufructuary character of the mortgage, so as to attract the operation of S. 98. Here however it must rather be regarded with reference to the possessory character of the mortgage, as intended for the benefit of the mortgagee. No authority directly relevant in such a case has been cited. But the language of S. 62 entails that postponement of the right to redeem to a date fixed in one way, with reference to repayment of the mortgage money from the profits, is not inconsistent with the usufructuary character of the mortgage ; and we have been shown no reason why such postponement to a date fixed otherwise, by actual specification

1. (1913) I. L. R. 43 Mad. 589

2. (1898) I. L. R. 23 Mad. 33.

should be so. In fact the simplest and the sufficient ground of decision is that the definition of a usufructuary mortgage in S. 58 (d) refers to payment of the mortgage money in connection only with the mortgagee's right to retain possession and includes nothing inconsistent with its application to mortgages, containing a condition for mere postponement of the right to repay.

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The conclusion must therefore be in plaintiff's favour and he must have a decree for redemption as proposed by the District Munsif, the Respondent being at liberty to draw the money, which, we understand, is in deposit in Lower Court.

The appeal is allowed with costs throughout.

Ramesam, J.—The plaintiff is the appellant. The suit is for redemption of a mortgage (Ex. I dated 3rd February 1893). The District Munsif decreed the suit, but on appeal, the learned District Judge allowed the appeal and dismissed the suit. Hence this Second Appeal.

Ramesam, J.

The portion of Ex. I material for the purpose of this case runs as follows:—"We have borrowed from you Rs. 1000/-we have put you in possession of the 8 acres 25 cents of land comprising.....towards the yearly interest of of Rs. 80 at 8 per cent. and the taxes payable to Sircar. Whatever might be the profits received from the said lands in every year they shall be taken in payment of interest aforesaid and the taxes on the land. You shall enjoy the profits from the said lands without having anything to do with the increase or decrease. You need not receive the said principal sum of Rs. 1000 even though we should pay you the same, within five years from the current year Nandana. It is settled that in case we should pay afterwards at one and the same time the said one thousand rupees on the 15th of Chitrai Sudham of any year, you should give up our land to us. If the principal sum be not paid within 20 years from this date you shall treat and enjoy these lands as having been sold to you absolutely."

The learned District Judge held that this mortgage is an anomalous mortgage as "the circumstance that an arbitrary term of five years has been fixed within which the mortgagor may not redeem is sufficient to take this mortgage out of the category of the usufructuary mortgages." It is clear that but for the special term he relies on, the mortgage would be, in

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his opinion, a usufructuary mortgage and I agree with him so far. The question therefore arises whether on account of the addition of a term providing for irredeemability within five years the mortgage ceases to be usufructuary. No authority has been cited in support of the learned judge's view and it seems to me that the addition of other terms not inconsistent with the main feature of the transaction does not destroy its character. In my opinion the mortgage is merely a usufructuary mortgage with a clog on the equity of redemption *cf.* the first alternative of Spencer, J. in *Srinivasa Iyengar v. Radakrishna Pillai* ¹. I do not think there is a combination of two kinds of mortgages in this case. There is no covenant to pay as in *Srinivasa Iyengar v. Radakrishna Pillai* ¹ (according to the view of Sadasiva Iyer, J.) and hence no simple mortgage. Nor is there a mortgage by conditional sale. The last clause which provides for an outright sale on non-payment for twenty years cannot make the transaction a mortgage by conditional sale) *Vide* the observations of Sadasiva Aiyar, J. in *Srinivasa Iyengar v. Radakrishna Pillai* ¹ (last seven lines) and Kumaraswamy Sastri, J. in *Hakeem Patte Muhammad v. Shaik Davood* ² with which I agree. For the same reasons there is no English mortgage.

The case in *Hakeem Patte Muhammad v. Shaik Davood* ² is clearly distinguishable. In that case, the essential elements of all the unmixed kinds of mortgage were wanting (see Spencer, J. at p. 1012 and Kumaraswami Sastri, J. at p. 1016.)

In my opinion the document is not an anomalous mortgage and the suit for redemption ought to have been decreed (See also *Kandalu Venkiah v. Donga Pallayya* ³ and *Verayya v. Venkata* ⁴.)

In the view taken by me, the more difficult question what is the exact operation of S. 98, *i. e.* whether it should operate subject to S. 60 does not arise.

The appeal will be allowed with costs throughout. I agree with the order proposed by my learned brother.

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•Appeal allowed.

1. (1913) I L.R. 38 Mad 667 at p. 669 26 M. L. J. 47.

2. (1915) I. L. R. 39 Mad. 1010 at p. 1016 ; 29 M. L. J. 525.

3. (1920) I, L. R. 43 Mad. 589.

4. (1888) I. L. R. 11 Mad 403.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUMARSWAMI SASTRI.

P. Rama Pattar ... Appellant. * (Plaintiff).

v.

A. Viswanatha Patter, Lakshmi alias
 Ammu Ammal, V. Anantarama
 Patter and Parameswaran, minor
 by guardian the 3rd respondent. ... Respondents. (Defendants).

*Contract Act—S. 25 (3)—H. Law—Joint Family—Manager—Debt, contracted for family purpose—Promissory note by junior members for, *after debt had become barred—Validity—Promissory note by two or more persons—Enforceability against all executants—Consideration moving to one or some of them only—Effect—Junior member of joint Hindu family—When entitled to act as manager—Harita's Text—Scope of*

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*Per Kumaraswami Sastri and Krishnan, JJ. (Odgers, J.*dissenting):—*
 A debt contracted by the manager of a joint Hindu family for a joint family purpose is a debt due by the other members of the family within the meaning of S. 25 (3) of the Contract Act, and a promissory note executed by the latter undertaking to pay such debt after it had become barred is valid and binding on them,

*Per Kumaraswami Sastri and Krishnan, JJ. :—*A promissory note executed by more persons than one is enforceable against all of them, if there was consideration for the instrument as a whole. It is not necessary that consideration should move to each executant.

*Per Krishnan and Odgers, JJ.—*Discussion of the circumstances under which a junior member of a joint Hindu family is, under the Hindu Law, entitled to act as manager. Scope of the text of Harita. "But if he (eldest member) be decayed, remotely absent or afflicted with decease, let the eldest son manage the affairs as he pleases" considered.

Second Appeal preferred against the Decree of the District Court of South Malabar in Appeal Suit No. 473 of 1919, preferred against the decree of the Court of the Additional District Munsif of Palghat in Original Suit No. 27 of 1919 (Original Suit No. 369 of 1916 on the file of the Court of the Principal District Munsif of Palghat).

C. V. Anantakrishna Aiyar, for appellant.

T. R. Venkatarama Sastri, for the 2nd and 3rd, respondents.

C. V. Mahadeva Aiyar for respondents 1 to 3, and the 4th respondent.

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The Court (Krishnan and Odgers, JJ.) delivered the following

Judgments : *Krishnan, J.*—The two acknowledgments made by defendants 1 and 2 in the account book, Exhibit B, are of no avail to save limitation against the joint family or against defendants 3 and 4, who were no parties to those acknowledgments. The District Judge has found on the evidence in this case that defendant 3, the father and managing member of the family, never ceased to be the manager, and never authorised any one else to act for him to manage and never held out any one as acting for him. This is a finding of fact which I think we must accept in Second Appeal. It was, however, contended that, even apart from any authority given by the 3rd. defendant, his son, the 1st. defendant, was entitled under the Hindu Law to act as the manager of the family in the absence of his father in Burma and elsewhere. For this position, reliance was placed on the ruling in *Mudit Narayan Singh v. Ranglal Singh*¹ and on the texts cited therein, particularly on that of Harita. The ruling itself is not applicable, as in that case it was found that the younger member had been put forward by his elders as the managing member. The text of Harita so far as it is relevant here (as translated by Setlur), says that if he (the manager) is remotely absent, the eldest son may manage the affairs of the family. See Setlur page 217. The words "remotely absent" are vague in their import, and I think they cannot be construed so as to bring within their scope the case of a manager who, though absent from his home, was in correspondence with the junior members and was controlling the management, as the District Judge finds was the case here. No reliance was placed on this text in the lower Courts, and, therefore, the question has not been properly threshed out on facts; it is, therefore, sufficient to say that plaintiff has not proved that the 1st. defendant, the eldest son, had authority under the Hindu Law to bind the family by his acknowledgments.

The question still remains how far defendants 1 and 2 are liable on their promise to pay the amount due on 14th September 1913. I think they are liable. It is conceded the words used therein clearly amount to a promissory note, for they say "we have hereby promised on signing this to give on demand

1. (1902) I. L. R. 29 Cal. 797.

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Rs. 1,577-4-5, the balance amount, with interest at Re. 1 per cent. from this day " and so on. Viewing this document as a promissory note, the executants of it must be held to be liable on it unless they prove that there was no consideration for it. This question should not be confused with the other question how far it was a valid acknowledgment against the family ; I have already held that it was not, as the signatories were not authorised agents of the family to acknowledge. Taking it as a promissory note, does the evidence here establish that there was no consideration for it ? The amount mentioned in it no doubt includes the sum of Rs. 1,084-5-6 and interest due by the father to the plaintiff on account of his dealings on behalf of the family and acknowledged by him to be correct in Exhibit A on 16th September 1907, or as much of it as has not been paid off. The dealings were subsequently carried on by defendants 1 and 2, professedly, no doubt, on behalf of the family and for themselves, for the account was changed into the names of defendants 1, 2 and 3 in the plaintiff's books. It is the result of these dealings taken with previous debt that amounted to Rs. 1,577 and odd included in the promissory note. Out of that sum, it is clear that both the defendants were personally liable for the items on the debit side in the account after the 16th September 1907, when the father ceased to have dealings and they began the dealings ; the credit items would be taken towards the old debt. The amount of it has not been ascertained, but it is apparently not very large. Though defendants 1 and 2 acted on behalf of the family in entering into those dealings, they would become personally liable for the amount on the finding that the family was not liable as they had no power to act on its behalf. The bulk of the amount included in the promissory note was no doubt the old debt that the father incurred, with interest added to it as appears from the account. For that portion of the note amount, though 1st. defendant was not originally personally liable and 2nd defendant was not liable at all, the whole of it was admittedly binding on the family property including the 1st. defendant's share in it ; in other words, it was a debt realisable from 1st. defendant's joint property. The note being executed thus for a sum partly realisable from his property and partly from his person, it seems to me there is full consideration for it so far as the 1st defendant is concerned. Even if we suppose the original family debt was

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not saved from limitation even as against defendants 1 and 2 by their acknowledgment of September 1910, the note would still be saved from being void against him under S. 25 of the Contract Act, both because his personal liability for his own dealings as to which there is proper consideration remains unaffected by limitation and also because under S. 25, clause (3), an agreement to pay a time-barred debt is sufficient to constitute a contract. It was argued that the liability of a member of a joint family to have his joint property sold for a debt contracted by the manager for a joint family purpose and binding on the joint family property is not an obligation that can be described as a debt within the meaning of S. 25. No authority has been cited to support this argument. No doubt it was ruled in *Narayanan v. Veerappa*¹ that a son was not "jointly bound" with his father within the meaning of the Bankruptcy Law of Singapore; but that is not the question here at all. The question here is whether a liability to have one's joint property sold for a sum due is not a debt within the meaning of S. 25, clause (3) I am inclined to think it is. The word 'debt' does not necessarily imply an obligation created by the debtor himself as argued by Mr. Venkatarama Sastri; we have decree debts imposed by Courts, for example. Debt is defined as "a sum payable in respect of a liquidated money demand, recoverable by action". See Stroud's Judicial Dictionary on page 471, 2nd edition, and the cases cited there. On this view there is no doubt that there was consideration for the promissory-note, and it is enforceable against the 1st defendant. It is then equally enforceable against the 2nd defendant, the other executant of it, as it is not necessary in law that consideration should move to each executant separately to make the note binding on him or her. It is sufficient if there was consideration for the instrument as a whole for it to be enforceable against all executants. Furthermore, in this case there was some consideration moving to the 2nd defendant herself for the note, viz., the amount due by her on the joint dealings of herself and her son after 1907; and inadequacy of the consideration is not a ground for avoiding a contract; vide Expln. 2 of S. 25 of the Contract Act.

I would therefore confirm the decree of the Lower Appellate Court and dismiss the Second Appeal with costs as

regards defendants 3 and 4 but allow the appeal and restore the Munsif's decree as regards 1 and 2 with costs in this and the Lower Appellate Courts.

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Odgers, J

Odgers, J. :—This is a suit to recover money due on an account. The 3rd defendant is the father of 1st and 4th defendants, and the manager of a Mitakshara joint Hindu family consisting of 1st and 4th defendants and himself. The 2nd defendant is his wife, and mother of 1st and 4th. defendants. The father (3rd. defendant), had incurred debts for family necessity to plaintiff. He served a period of over three years imprisonment from 1903 or 1904. The dealings began in 1901. On 16th September 1907, while third defendant was in jail, accounts were adjusted and balance struck by 3rd defendant and plaintiff and acknowledged by the former (Exhibit A.) Subsequently 3rd defendant was released from jail, but did not return to his family ; it appears that he was living in Rangoon. On 16th September 1910, 2nd defendant and her son 1st defendant, who had just then attained majority, signed the following statement "Since the bar of limitation is approaching etc."

Subsequently on 14th September 1913, the same two persons executed a promissory note to plaintiff in the following terms "We have hereby, etc." Two questions have been argued (1) Do the above operate as valid acknowledgments in order to save limitation against defendant 3 as manager of the family, (2) Do the above operate in any event against defendant 2 and defendant 1 personally ?

As to (1), reliance is first placed on a text of Harita (Setlur page 217), where it is said "But if he (eldest member) be decayed, remotely absent or afflicted with disease, let the eldest son manage the affairs as he pleases". Also on I. L. R. 29 Calcutta 797, where it was decided "that a younger member of a mitakshara family may deal with family property for family necessity whenever he is put forward to the outside world by the elder members as the managing member". The finding of the Lower Appellate Court is that defendant 3 never ceased at any time to be manager, and this finding is based on a voluminous correspondence carried on between the defendants with regard to family affairs while defendant 3 was absent. It is difficult to see how 3rd defendant's absence in Rangoon can justly be said to make him 'remotely absent' in modern days with all the conveniences of modern communication. It is

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equally difficult to see how defendant 1 was ever put forward to the outside world as managing member. I agree with the District Judge that mere payment of rents by defendant 1 and defendant 2 is insufficient to show this.

Further, in *Pattu Hari Premji v. Hukamchand*¹ it is laid down that temporary absence of the father conferred no legal authority on the son, if not authorised by the father, but assuming to act for him. The words in Ex. B, "as per the instructions of the said Anantarama Patter (defendant 3) and ourselves are insufficient to import either of these elements, as they refer to the "amount expended by you (*i. e.*, plaintiff) for our family necessities". It is further clear that under no circumstances could the wife, defendant 2, have any authority or power to act as manager so as to bind the joint family after her son, defendant 1 had attained his majority.

I am, therefore, of opinion that neither defendant 1 nor defendant 2 had any power or authority from defendant 3 to act as managers of the family, nor did defendant 3 ever cease to be the manager.

As to their personal liability, I must differ with reluctance from my learned brother. Reliance is placed on the fact that some new items of credit and debit appear in the accounts signed by defendant 1 and defendant 2. The accounts settled by defendant 3 in 1907 was admittedly an account binding on the family for supplies for family purposes. In the absence of evidence to the contrary it must be assumed that the new items of debit were of the same nature. In my opinion there was no extinction of the old debt and a novatio by which the plaintiff undertook to look to the credit of defendant 2 and defendant 1 alone. The account stood in the name of defendant 3 alone up to 1911, and plaintiff's case has always been that the debt is binding on the family; defendant 2 was as stated not authorised either in law or in fact to bind the family; it seems, therefore, that there was no consideration for her signatures in Ex. B, and the fact that the 2nd signature was to a promissory note would make no difference, considering the nature of the debt (which was not hers) and for which she was in no way personally liable, nor could she make herself so liable. As to defendant 1, is he a debtor within the meaning of Ss. 19-21 of the Limitation Act? If he had no authority to act as manager for his

1. (1884) I. L. R 10 Bom. 363.

father, as I found above, he cannot be a duly authorised agent to sign for him as such. *Cf. Letchmi Narain v. Daya Shankar* 1. Further, according to I. L. R. 40 Mad. 581, a Hindu son is not jointly bound with his father, to pay debts contracted by the father. For the reasons stated, the debts which defendant No. 1 bound himself to pay were the debts of the father contracted by the father.

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The debts were not the debts of defendant No. 1. Further, the case does not fall within S. 25 (3), Contract Act, as the son was not generally or specially authorised to sign for his father. For these reasons, I am of opinion that neither defendant 2 nor defendant 1 is personally liable.

On both the grounds raised in this Second Appeal, in my opinion, the appeal must be dismissed with costs.

By Court :—As we have differed in our opinion on the questions whether there was consideration in law for the promissory note of date 14th. September 1913 and executed by defendants 1 and 2 and whether it is binding on those defendants, we refer those questions under S. 98, Civil Procedure Code, clause (2) proviso, for the opinion of a third Judge. The case will thereafter be posted again before us.

C. V. Anantakrishna Aiyar, for the appellant.

T. R. Venkatarama Sastri and *C. V. Mahadeva Aiyar*, for respondents Nos. 1 to 3 and the 4th respondent.

The Court expressed the following

Opinion :—This second appeal comes before me owing to a difference of opinion between Krishnan and Odgers, JJ. as to whether there was consideration in law for the promissory note, dated the 14th of September 1913 executed by the 1st and 2nd defendants and whether it is binding on these defendants.

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The plaintiff is the brother of the 2nd defendant. The 2nd defendant is the mother of the 1st defendant. The 3rd defendant is the father and the 4th defendant is another brother, who is a minor. It is admitted that defendants 1 to 4 are members of a joint Hindu family. There were dealings originally between the plaintiff and the 3rd defendant. On the 16th of September, 1907, when 3rd defendant was in jail, there was a settlement of accounts at which a sum of Rs. 1,084-5-6 was found due by 3rd defendant, and the 3rd defendant affixed his signature to the

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duly stamped settlement acknowledging the amount to be due. Dealings went on subsequently, the heading of the account being "C. V. Anantarama Pattar's (3rd defendant's) credit and debit account." In 1910, as the claim was about to be barred, the following entry was made in the account book on the 16th September, 1910. "Since the bar of limitation is approaching the said amount which was expended by you as per the instructions of the said Anantarama Pattar and ourselves for our family necessities and since the said Anantarama Pattar is absent from here, we hereby admit the said amount which we owe you as per this account". This is signed by the 1st and 2nd defendants. The dealings continued. They were mostly entries of receipts of paddy from the land, and small sums were also entered on the debit side. On the 14th of September, 1913 accounts were settled and a sum of Rs. 1,577-4-5 was found due and the following entry was signed in the plaintiff's account books by the 1st and 2nd defendants. "We have hereby promised, on signing this, to give on demand, Rs. 1,577-4-5, the balance amount, with interest thereon at Rupee one per cent. from this date, due to you from us after adjusting the credit and debit account as per account executed by us on 16th, September, 1910, together with interest from 1st Kanni 1086 till date for the amount expended by you as per the instructions of my father Anantarama Pattar and ourselves for our family necessities." In the account book Ex. C, the heading is "Accounts concerning Anantarama Pattar, son of Venkatarama Pattar, wife Lakshmi *alias* Ammu Ammal and son Viswanatha Pattar".

Both the learned Judges who heard the Second Appeal are of opinion that, so far as the second acknowledgment of liability of the 16th of September, 1910 is concerned, it does not save limitation as it was not proved that the 1st and 2nd defendants had any authority to acknowledge the debt as the father was the managing member of the family. The question, however, remains as to the liability on the promissory-note dated the 14th of September 1913. Krishnan, J. was of opinion that it was open to the 1st defendant to promise to pay a barred debt and that there was consideration for the note. Odgers, J. was of opinion that the debt was not a debt of the 1st defendant but that of the father which had become barred and that there was no consideration for the note.

It is clear from the facts of the case that the defendants are members of an undivided family of which the father was the managing member. So far as the transactions are concerned, it is equally clear—and it is not disputed before me—that the debts were contracted for the benefit of the joint family and would be binding on the joint family properties. The first question is whether in the case of a joint family, the debts contracted by the managing member for the joint family can be said to be debts due by the other members of the family within the meaning of S. 25 of the Indian Contract Act, which runs as follows:—An agreement made without consideration is void, unless.....it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits". So far as the liability of the members of a joint family for the debts contracted by the managing member is concerned, I think it is clear that the debt is binding on them although in the enforcing of that debt they would not be personally liable, but only liable to the extent of the joint family properties in which they are interested. In *Challamayya v. Varadayya* ¹ Subramania Ayyar, J. after referring to cases where the other coparceners were parties to the contract or had agreed to be bound by it or had ratified it observed "when however such is not the case, but the contract is of a character such as, under the law, to entitle the manager to enter into independently of the consent of the other members of the family, so as to bind them thereby, then it is clear that the scope of the manager's power is restricted to, and does not extend beyond, the family property". I may also refer to the decision in *The Official Assignee of Madras v. Palaniappa Chetty*, ² as to the liability of the members of a joint family. In such cases it is open to the creditor to sue all the co-parceners, and each of the co-parceners will be liable to pay the debt subject to the limitation that payment can be enforced only by having recourse to the joint family properties. A debt is none the less a debt because the remedies open to the creditor are circumscribed by the joint family assets. I can find no authority for the view that the debt contemplated by S. 25 of the Contract Act is a debt which

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1. (1898) I. L. R. 22 Mad 167.

2. (1918) I. L. R. 41 Mad, 824 : 35 M. L. J. 473.

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can be enforced against the person and properties of the debtor. The test is whether at the time the promise to pay is made the person making the promise could have been sued for the recovery of the debt but for the law of Limitation, however circumscribed the remedies for the recovery of the debt in execution may be owing to the personal law governing the debtor.

Reliance was placed by Mr. Venkatarama Sastri on *Narayanan v. Veerappa*³ where it was held that a son was not 'jointly bound' with his father to pay his debts within the meaning of Cl. 4 S. 30 of the Straits Settlements Bankruptcy Ordinance. The question turned on the pious duty of the son to discharge his father's debts not illegal or immoral; and the learned Judges observed. "This liability as now developed is certainly not a joint liability, nor a joint and several liability as ordinarily understood in English law; in fact it is difficult to bring it under any particular legal category of the English law." The facts of the present case are different. The debts were contracted for family necessity and benefit, and the claim is based not merely on the pious duty of the son to pay his father's debts not illegal or immoral, but on family necessity and benefit enjoyed by the members of the family.

So far as the 1st defendant is concerned, I am of opinion that the note is binding on him. As regards the 2nd defendant, her mother, it is argued that when she signed the promissory-note the whole of the sum of Rs. 1,230 found due at the settlement of 1910 was barred by limitation, and that as regards the subsequent items they consist of a few items of debit and mostly of items of credit from the income of the 2nd defendant's lands; and that the credits are far in excess of the debits. This leaves her indebtedness practically the same as that of the previous settlement, the increase being due to interest. I have already given my reasons for holding that the 1st defendant is liable, and it appears both from the settlement of 1910 and 1913 that the 2nd defendant was aware of the dealings and requested plaintiff to make the advances. The extent of the debits and credits subsequent to the settlement of 1910 is immaterial. It is not necessary that each of the executants of a promissory-note should receive the consideration. When a promissory-note is executed in respect of transactions which have gone on for some years and the items

consist of advances which would be barred, and of subsequent dealings. I do not think the settlement can be impeached as to the items which would but for the settlement be barred, so long as there is no fraud or mistake. The statement in the promissory-note is that the loans were made at the request of the 2nd defendant, and she has not ventured to give evidence. Having regard to the fact that she owns lands which were managed by the plaintiff, the probabilities are that her signature to the pro-note and settlement was not taken as a mere matter of form, but that the plaintiff would not have made the advances but for her joining in the settlement. I am of opinion that the note is binding on her.

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In the result, I agree with the conclusion arrived at by Krishnan, J. that the note is binding on the 1st and 2nd defendants.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR WILLIAM AYLING, OFFICIATING CHIEF JUSTICE AND MR. JUSTICE ODGERS.

Palanikumara Chinnayya Gounder ... *Petitioner * in both (Accused).*

Madras Act III of 1895—S. 7—Village Officer—Proceeding of Revenue Divisional officer against—Charges framed in course of—Nature of proceeding departmental enquiry or Criminal proceeding—Revision to High Court against order framing charges—Maintainability—Government of India Act—S. 107—Regulation VI of 1831—Collector acting under—Not subject to superintendence of High Court—Penal Code—S. 171 C—Offence under—What amounts to—Civil Contempt—High Court—Order calling for records from Court below—Disobedience of Lower Court—Effect—Appellate jurisdiction—Revisional jurisdiction if part of.

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Even where the facts alleged against a village officer constitute a criminal offence, it is in the discretion of his superiors to proceed either by way of prosecution or by way of departmental action under S. 7 of Madras Act III of 1895.

Where a Revenue Divisional Officer framed against a Village Munsif two charges to the effect (1) that the Village Munsif had told people not to vote at the elections, and (2) that he had made false representations as to increase of taxation and confiscation of property as a result of voting, *held*, in a revision petition filed against the order framing those charges.

(1) that the proceeding resulting in the order was a departmental inquiry under S. 7 of Madras Act III of 1895, and was not a Criminal proceeding.

(2) that the Revenue Divisional officer proceeding under the said section was not a court subject to the Superintendence of the High Court within the meaning of S. 107 of the Government of India Act.

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(3) that the collector's power of control over Village officers under Regulation VI of 1881 was also not subject to the Superintendence of the High Court.

Semble Neither of the charges framed by the Revenue Divisional Officer amounted to an offence under S. 171 C of the Penal Code.

On the admission of the Revision petition, the High Court called for the records under S. 145 C. P. C., but the Revenue Divisional officer refused to forward the same. *Held*, that the officer was guilty of a civil contempt, despite the fact that the order calling for the records was eventually held to be wrong.

Appellate jurisdiction includes the power to interfere in revision and is not confined to cases in which the law allows a regular appeal.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act preferred to the High Court praying that the charges framed by the Revenue Divisional Officer of Erode against the petitioner on 8th January 1921 and all proceedings before the said officer connected with those charges may be quashed.

Petition praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to commit the Revenue Division Officer of Erode for contempt for disobedience to the order of this court dated 18th February 1921 in C. R. P. No. 26 of 1921 and to order stay of all further proceedings before the said Revenue Divisional Officer of Erode consequent upon his proceedings dated 8th January 1921 pending disposal of this petition.

V. C. Seshachariar for Petitioner

Public Prosecutor (J. C. Adam) for the Government.

The Court delivered the following

Ayling,
Offg. C. J.

Judgments:—*The Officiating Chief Justice*.—Petitioner in this case is the Village Munsif of Sivagiri in Erode Taluk and moves us to interfere in revision and quash certain charges framed against him by the Revenue Divisional Officer of Erode and all proceedings before that Officer connected with the charges. The charges run as follows:—

" (1) That you being a Government servant, actively associated yourself in the movement of non-co-operation against Government by going with Mr. E. V. Ramaswami Nayer of Erode to the Sivagiri shandy on 26th November 1920 and telling people there not to vote at the elections of the 30th idem.

" (2) That you dissuaded and prevented people from recording their votes by making false representations both in the

shandy on 26th November 1920, and at the polling station on 30th November 1920 and that the result of voting would involve the increase of taxes and the relinquishment of the voters' properties to those in favour of whom the votes were recorded etc.

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Mr. Adam the Public Prosecutor who appears on behalf of Government takes the preliminary objection that the proceedings in question are taken under Act. III of 1895, S. 7 and that this Court has no jurisdiction to interfere.

The first point for determination is clearly the nature of the proceedings. Mr. Seshachari who argued the case most exhaustively for the petitioner contends in the first place that they are criminal: and his main ground for revision is that the facts charged amount to a Criminal offence under S. 171-C of the Indian Penal Code and can only be enquired into on sanction accorded under S. 196 of the Criminal Procedure Code. This view seems to me to be clearly wrong.

The charges have been framed by the officer holding the enquiry as "Revenue Divisional Officer" and in that capacity he is undoubtedly entitled under S. 7 of Act III of 1895 after enquiry to fine, suspend, dismiss or remove the holders of certain Village Munsifs for misconduct, neglect of duty, incapacity non-residence or other sufficient cause. Under rules framed under S. 20 of the same Act, he is bound to record charges and examine witnesses for and against them. All his procedure in this case appears to have been such as he would have adopted if he were acting under S. 7 of Act III of 1895: and I have no doubt whatever that this is the provision of law under which he purported to act. Even supposing that the facts alleged against petitioner constituted a criminal offence, which seems to me extremely doubtful, it is difficult to see how this would be incompatible with the Revenue Divisional Officer taking action under S. 7 of the Act. It must be in the discretion of a Village Officer's superiors to proceed either by way of prosecution or by way of departmental action under the section.

The nature of the proceedings being thus determined, has this court any power to interfere in revision? The petition is filed under S. 115 of the Civil Procedure Code and S. 107 of the Government of India Act. The former is obviously inapplicable.

S. 107 says:—

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"Each of the High Courts has superintendence over all Courts for the time being subject to its appellate jurisdiction."

Now, can an officer acting under S. 7 of Act III of 1895 be styled a court subject to this Court's appellate jurisdiction?

I think not. Appellate Jurisdiction no doubt includes the power to interfere in revision and is not confined to cases in which the law allows a regular appeal. As stated by Subramania Ayyer, J. in *Chappan v. Moidin Kuttu*¹ the two things required to constitute appellate jurisdiction are the existence of the relation of superior and inferior court and the power on the part of the former to review decisions of the latter. I accept this definition but I cannot see here either the relation or the power. It cannot be assumed that every officer exercising statutory powers in this Presidency stands to this Court in the relation of an inferior court to a superior, or that we have the power to review his decisions. Madras Act III of 1895 is a self contained Act which, as set out in its preamble, purports to provide "for the succession to certain hereditary village-offices in the Presidency of Madras; for the hearing and disposal of claims to such offices or the emoluments annexed thereto; for the appointment of persons to hold such offices and the control of the holders thereof; and for certain other purposes."

It contains provisions dealing with all these matters; and places the decisions in all cases in the hands of the Revenue officers under the control of the Board of Revenue. The jurisdiction of Civil Courts to decide claims to offices and emoluments is specifically barred, except in one particular case, by S. 21: and as regards order under S. 7, with which we are concerned, S. 23 provides for appeals to the District Collector or Board of Revenue whose decision, it says, "shall be final." I find it impossible to hold on a perusal of the Act that the Legislature intended that these decisions should be subject to review by the High Court. I fail to see how we have any power of interference.

It has been suggested that if this be so, Act III of 1895 purported to take away powers which the High Court possessed prior to its enactment and to that extent is *ultra vires*; but I can discover no basis for this. Prior to its enactment the position of hereditary village officers was governed by Regulation

1, (1897) I. L. R. 22 Mad 68.

VI. of 1831; and this Regulation is if possible, even more explicit than the Act now in force in placing such village officers as the petitioner under the exclusive control of the Revenue authorities. S. 7 of the Regulation provides that "all other persons who hold or may thereafter hold hereditary villages or other offices in the revenue and police departments to which emoluments have been annexed by the State, shall be under the immediate authority and control of the Collectors of the Districts in which such offices are established, and shall be liable to suspension or removal from office for incapacity, neglect of duty, or other just cause, by the orders of the Collectors, subject in every instance to the approval of the Board of Revenue, and to the sanction of the Governor in Council in all cases in which he may see fit to interfere." It seems to me impossible to contend that the Collector's power of control over village officers under this Regulation was subject to the superintendence of the High Court; and I am not aware of any single case, out of the innumerable cases of dismissal, etc., which must have occurred under the Regulation or under the present Act, in which this court's interference has been invoked.

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Clause 16 of the Letters Patent to which Mr. Seshachari has referred us seems to me to advance the case no further than S. 107 of the Government of India Act.

The same learned vakil has cited two cases, *Nilmmani Singh Deo v. Taranath Mukherjee* ¹ and *Chaitan Patgose Mahapatra v. Kunju Behari Patnaik* ² arising out of the Bengal Rent Recovery Act (No. X of 1859). This Act, on much the same lines as our own Madras Act, VIII of 1865, is of a very different nature to the one we are now considering. The rent Courts constituted under it practically perform the functions of Civil Courts in certain matters: and it is sufficient for the present purpose to quote the words of Norman, J. in *Bhyrub Chandur v. Shama Soonderee Debea* 6 W. R. 68. "It is clear that the Collectors Court is a Court over which at the time of the passing of the Charter Act, the Sudder court possessed appellate jurisdiction and therefore it is clear that the 15th section of the Charter Act gives us a superintendence over such courts."

1. I. L. R. 9 Cal. 205.

2. I. L. R. 38 Cal. 832.

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Neither of the other cases relied on *The Collector of Thana v. Bhaskar Mahadev Sheth*¹ *Balakrishna Udayar v. Vasudeva*² and *Paramaswamy Aiyangar v. Alamelu Natchiar Ammal*³ appear to me to contain anything helpful to petitioner.

I must therefore hold that the Revenue Divisional Officer proceeding under S. 7 of Act III of 1895 is not a Court subject to the superintendence of this Court and that the revision petition should be dismissed.

The subject matter of Civil Miscellaneous Petition No. 1697 of 1921 is dealt with in the judgment of my learned brother and it seems unnecessary for me to add anything to what he has said.

Odgers, J.

Odgers, J. :—This is a petition to revise the order of the Revenue Divisional Officer, Erode, dated 8-1-21 wherein certain "charges" were framed against the village munsif of Sivagiri. It is first contended that this is a criminal matter and falls within the 'corrupt practices' sections added to the Indian Penal Code by Act XXXIX of 1920 and that the Revenue Divisional Officer's order was *ultra vires* as no sanction for the proceedings had been obtained under S. 196, Criminal Procedure Code. The sections of the Indian Penal Code relied on are 171 (c) and 171 (f). Secondly, it is contended that even if it is not a criminal matter we ought to interfere under either S. 115, Civil Procedure Code, S. 107 of the Government of India Act or Clause 16 of the Letters Patent. The first consideration, therefore, is, is this a criminal matter? As the Judge who admitted the petition when this was the only ground presented, I must confess that at first I thought it might prove to be so. The charges are set forth in detail and the Revenue Divisional Officer is also a 1st Class Magistrate. There is ground for saying that the matter was presented in such a form as to have the appearance of a criminal matter and the learned vakil who appeared naturally did nothing in argument to detract from this. The contention on the other side is that this is a purely departmental enquiry into the conduct of this village Munsif. The so-called "charges" are as follows :—

"(1) That you being a Government servant, actively associated yourself in the movement of non-co-operation

1. I. L. R. 8 Bom. 264.

2. (1917) I. L. R. 40 Mad. 793; 33 M. L. J. 69.

3. (1918) I. L. R. 42 Mad. 76; 35 M. L. J. 632.

against Government by going with Mr. E. V. Ramaswami Naicker of Erode to the Sivagiri Shandy on 26-11-1920 and telling people there not to vote at the elections of the 30th idem.

(2) That you dissuaded and prevented people from recording their votes by making false representations both in the shandy on 26-11-20 and at the polling station on 30-11-1920 that the result of voting would involve the increase of taxes and the relinquishment of the voters' properties to those in favour of whom the votes were recorded etc.

Are these within Ss. 171 (c) and 171 (f), Indian Penal Code? The first charge is simply telling people not to vote; the second is false representations as to increase of taxation and confiscation of property. I greatly doubt if either of these would constitute voluntary interference with free exercise of electoral rights so as to constitute the offence of undue influence at an election for which punishment is prescribed in S. 171 (f). Under the English Statute (on which presumably the new sections of the Indian Penal Code are modelled) 46 and 47 vict. Ch. 51 S. 2 the following persons are guilty of undue influence.

(1) Every person who directly or indirectly by himself or by any other person on his behalf makes use of or threatens to make use of any force, violence or restraint, or inflicts threatens to inflict by himself or by any other person any temporal or spiritual injury, damages harm, or loss upon or against any person in order to induce or compel such person to vote or refrain from voting, or on account of such person having voted or refrained from voting at any election; and

(2) Every person who by abduction, duress, or any fraudulent device or contrivance succeeds in impeding or preventing the free exercise of the franchise of any elector or thereby succeeds in compelling inducing or prevailing upon any elector either to give or refrain from giving his votes at any election.

I think, therefore, upon further consideration that neither of these so-called charges would fall within the mischief of S. 171 (c). There is, however, an almost clearer ground for distinction. The petitioner is a village Munsif and is as such amenable to the Hereditary Village Officers Act (Madras Act III of 1895). S. 7 of that Act provides that the Collector may after enquiry fine, suspend, dismiss or remove the holder of any the offices forming class (1) in S. 3 (of which the village munsif is one) for misconduct, neglect of duty or incapacity or non-

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residence or for any other sufficient cause. S. 20 of the Act provides, that the Board of Revenue may make rules for *inter alia*, the holding of enquiries under S. 7 and the hearing of appeals under S. 23. This last section provides for an appeal from the order of a Collector under S. 7 to the District Collector and if the latter passed the order appeal from to Board of Revenue. "The decision, on appeal of the District Collector or the Board of Revenue, as the case may be, shall be final." The Board of Revenue made rules under S. 7 and they are published in the Fort St. George Gazette of 26-8-98. The rules perhaps rather unnecessarily incorporate certain legal terms familiar to us in criminal proceedings including the use of the word, "charges."

On the whole, I have come to the conclusion having regard to the above and to the fact that the officer purported to act as Revenue Divisional Officer, that this was a departmental enquiry under Madras Act III of 1895, and was, therefore, not a criminal proceeding. This being then a civil matter have we any jurisdiction to interfere? We clearly have none under S. 115 Civil Procedure Code and this was not seriously pressed by Mr. V. C. Seshachari for the petitioner. His contention was that we could interfere under S. 107 of the Government of India Act and clause 16 of the Letters Patent. The former gives each High Court "superintendence over all courts for the time being subject to its appellate jurisdiction," and the question arises as to whether a Revenue Officer acting under S. 7 of Act III of 1895 is subject to our appellate jurisdiction. As laid down by Subramania Ayyar, J. in *Chappan v. Moidin Kutti* ¹ 'appellate jurisdiction' means "the power of a superior court to review the decision of an inferior court". Here the two things which are required to constitute appellate jurisdiction are the existence of the relation of superior and inferior court and the power on the part of the former to review decisions of the latter. Is there such a relation here? It is clear that a Collector dealing with matters under the Rent Recovery Act is not in such relation in Madras. *Velliperianthira v. Moidin Padsha* ² and *Appaindai v. Srihari Joshi* ³ and *Venkatanarasimha Naidu v. Suranna* ⁴. In *Nilmoni Singh Deo v. Taranath Mukerjee* ⁵ the

1. I. L. R. 22 Mad. 88 at p. 80.

2. I. L. R. 9 Mad. 332.

3. I. L. R. 16 Mad. 451.

4. I. L. R. 17 Mad. 292.

5. I. L. R. 9 C. 295.

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Privy Council clearly states that the process under consideration was not the trial of any question regarding rent, but that the Act in question (X of 1859) went beyond the trial of such questions and provided for the execution of decrees ; and it is also clear that the Collector's court is a court over which at the time of the passing of the Charter Act the Sudder Court possessed appellate jurisdiction and that S. 15 of the Charter Act gave the Calcutta High Court superintendence over such Courts. See Norman, J. in *Bhyrub Chunder Chunder v. Shama Soonderee Debea* ⁶. The Act dealt with by the Privy Council in this case was of a very different nature to the one under consideration here and as already stated it has been held here that the proposition does not apply to the Rent Recovery Act in Madras.

The 'relation' thus being found not to exist, does the 'power' exist? The answer is, as pointed out by my lord that the Act in question (III of 1895) is self-contained. There is no appeal beyond the District Collector or the Board of Revenue as stated above, save in one solitary instance, S. 21 and on one solitary ground, viz., on the ground of want of jurisdiction because no emoluments appertain to the village officer in respect of which the suit is brought. It was thus obviously the intention of the Legislature that the civil courts should, save in the case under S. 21, not interfere. The contention raised on this is that the Act is *ultra vires* of the local Legislature and that it has no power to displace the power of superintendence of the High Court. But if the High Court never had such power on the ground that the relation of superior and inferior court did not in this instance exist, the Act cannot have taken it away. Further the previous Regulation (VI of 1831) relating to village offices declared in its preamble, "whereas—it is necessary to provide that no claim to such offices, or to any of the emoluments annexed thereto, shall be cognizable by the ordinary Courts of Judicature, and to render all such claims adjudicable exclusively by the Officers of Government in the Revenue Department," etc., S. 6 provides that the orders of the Board of Revenue shall be final and conclusive—See also S. 7. The provisions of the Regulation will thus be seen to be even more unequivocal than most of the sections in the Act. No case has been brought to our

4. (1882) I. L. R. 9 Cal. 295

6. (1866) 6 W. R. 68.

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notice where the contention of *ultra vires* either under the Regulation or the existing Act has been raised or decided, and disposals under both must have been and must still be of very frequent occurrence. With regard to clause 10 of the Letters Patent I do not think the case for the petitioner can be carried further under that as I have already stated my reasons for holding that the Collector is not subject to the superintendence of the High Court in matters arising out of Act III of 1895.

In *Balakrishna Udayar v. Vasudeva Ayyar*¹ it was held that under the provisions of Act XX of 1863, S. 10, the Civil Court (in this case the Collector) exercised its powers as a Court of law not merely as a *persona designata*. *Paramaswamy Aiyangar v. Alamelu Natchiar Ammal*² held that where a Revenue Court had dealt with a question of succession under the Madras Estates Land Act, without taking evidence the High Court could revive the order under S. 115, Civil Procedure Code, as that section had been made applicable to proceedings in Revenue Courts under that particular Act by S. 192 of that Act.

Neither of these cases decided on the provisions of Acts widely differing from the one under discussion can help the petitioner's case.

I am therefore of opinion that this is a matter in which we have no power to revise the proceedings of the Revenue Divisional Officer and I would dismiss the petition.

There is further a motion to commit the Revenue Divisional Officer, Erode, for contempt for refusing to forward the records in this case. The revision petition was admitted by me on 18-2-21 and on 21-2-21 the office called for the records under S. 115, Civil Procedure Code. The Collector to whom the Revenue Divisional Officer forwarded this Court's notice calling for the records, replied on 3-3-21 as follows:—"There has been no decision to enable S. 115 of the Code of Civil Procedure to be applied nor does the notice quote the number of the decree or order to which it purports to refer. I therefore, return it."

1. (1917) 19 L. R. 40 Mad. 793

2. (1918) 1 L. R. 42 M. 176.

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On 11-3-21 the office again called for the papers and specified the order referred to. This was simply endorsed by the Collector under date 20-3-21 as follows.—“Returned. There has been no decision to make S. 115, C. P. C. applicable”. The matter, if any, is a civil contempt and there is authority to show that it makes no difference if the order calling for the records is wrong, *i. e.*, that it has eventually been held by us that S. 115, C. P. C. does not apply. That this was hardly self-evident is witnessed by the long and learned arguments addressed to us and by our detailed judgments in this case. The question of contempt was not seriously argued and I do not propose under the circumstances to go into the question further than to set out the facts as I have done above and to observe that the letter and endorsement of the Collector were neither courteous nor respectful to this Court and that the attention of Government will be drawn to the matter.

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Petition dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUMARASWAMY SASTRI.

Porkodi Achi

... 1st Respondent in S. A. No. 22 of
1921 on the file of the High Court.

Court Fees Act, VII of 1870 Sch. II Art. 17, Cl. (6) and Sch. I—Suit for recovery of possession of immovable properties—Decree in favour of plaintiff on condition of his paying a certain amount to the defendant—Appeal by plaintiff to get rid of the condition—Valuation of appeal for the purpose of court fees.

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Where in a suit for recovery of possession of immovable properties, the plaintiff is held liable to pay a sum of money to the defendant as a condition precedent to his recovering the properties, the proper court-fee to be paid by the plaintiff for an appeal against the decree is an ad valorem court fee on the amount the payment of which is made a condition precedent by the decree of the lower court, and not a court fee of Rs. 10. The entire case law on the subject reviewed and discussed.

The value of an appeal is not in all cases the value of the suit as originally filed but the value of the relief granted by the decree which a party wishes to get rid of.

Memorandum of Objections sought to be preferred by the 1st Respondent in S. A. No. 22 of 1921 to the High Court against the decree of the Court of the 3rd Additional Subordinate Judge of Tanjore at Mayavaram in A. S. No. 13 of 1920,

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preferred against the decree of the Court of the Principal District Munsif of Tiruvalur in O. S. No. 44 of 1918.

K. S. Venkataramani Aiyar for 1st Respondent

The Government Pleader (C. Madhavan Nair) on behalf of Government.

The Court delivered the following

Order:—The 1st respondent as daughter and reversioner filed a suit for a declaration that the sale deed executed by the widow of the last male holder alienating the lands specified in the plaint was not binding on her, for delivery of possession by the defendants who claim under the vendee, for mesne profits and costs. The plaint contained an alternative prayer that should the Court find any amount payable to the defendants then possession be decreed with mesne profits on payment of the sum so found due by the plaintiff to the defendants. Various pleas were raised by the defendants who contended that the alienation by the widow was binding on the plaintiff. The District Munsif dismissed the plaintiff's suit as he was of opinion that the sale was binding on her. On appeal the Subordinate Judge held that there was necessity only for a sum of Rs. 3881-4-0 out of the consideration of Rs. 8,000 set out in the sale deed and decreed possession on payment of the sum of Rs. 3881-4-0. Against this decree the defendants filed a second appeal and the plaintiff filed a memorandum of objections objecting to the decree of the Subordinate Judge so far as it directs her to pay Rs. 3881-4-0 as a condition precedent to the recovery of possession. A stamp duty of Rs. 10/- was paid on the memorandum of objections and the Registrar claims an advalorem duty on the sum of Rs. 3881-4-0 the liability to pay which is questioned in the memorandum of objections.

The suit as filed being one for possession and mesne profits fell within cl. 5 of S. 7 of the Court Fees Act which relates to suits for possession of immoveable property and cl. 1 which relates to suits for money and the plaintiff paid a stamp duty of five times the kist payable on the lands and also on the amount claimed for mesne profits. The suit was valued at Rs. 2300/- and the second appeal is also valued at that figure.

There is no express provision in the Court Fees Act which covers a case like the present. The contentions of the respon-

dent are (1) that the decree of the Lower Appellate Court merely declares plaintiff's liability to pay a certain sum of money as a condition precedent to recovery of possession and that such decree is not executable by the defendants for whose benefit the payment is to be made, (2) that the suit being one for possession of immoveable property and mesne profits its nature is not changed into one for redemption merely by the fact that an unsustainable condition as to payment has been imposed by the Court, (3) that the alternative prayer in the plaint as to payment of such sums as the Court may find to be due is not estimable in money and falls under Article 17 Cl. 6 of Sch. II, (4) that in any event the stamp duty payable on the memorandum of objections cannot be more than the duty payable on the plaint as it would be an anomaly if the party who fails entirely should have to pay less than a party who succeeds in part. The contention of the Registrar is that the stamp duty payable in cases where a person is asked to pay a certain sum as a condition precedent to *getting possession* and disputes his liability, is on the amount which he disputes.

I do not think that the direction as to payment of a sum of money as a condition precedent to the recovery of possession makes the decree a declaratory decree simply because the defendant cannot execute the decree. The test is whether the plaintiff cannot execute it. As regards the contention that the alternative prayer is not estimable in money, all that can be said is that the plaintiff reversioner cannot say when he filed the plaint what the defendants can prove to be binding on the plaintiff. Where the Court finds the amount that has to be paid by the plaintiff the amount is ascertained and where the plaintiff wants to appeal against the decree the amount or value of the subject matter in dispute for the purposes of article I of Schedule I is the amount which the plaintiff calls in question in the memorandum of appeal or objections. The case is analogous to one of a suit for an account.

The objection that the suit for possession which falls under Cl. 5 of S. 7 cannot in appeal change its nature because a condition is annexed for payment of a sum of money which is disputed by the plaintiff presents more difficulty especially as there is no provision in the Court Fees Act governing such cases and there is a conflict of authority.

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In *Reference under Court Fees Act S. 5*¹ which was a reference under the Court Fees Act the question was what the duty payable was in a suit for ejectment where a tenant claimed compensation for improvements which was disallowed and the tenant appealed against the decree. It was held that the tenant was bound to pay stamp duty only on the value of the lands and not on the value of the improvements claimed and disallowed. Subramania Aiyar and Boddam, JJ. were of opinion that the claim for improvements to the land was not the subject matter of the suit but was merely incidental to the decree for possession. The learned Judges also refer to the difficulty and inconvenience of ascertaining the fee payable in each case if a different view were adopted. With respect, it seems to me that in cases where the law annexes the liability to pay for improvements as a condition precedent to ejectment, the claim for improvements allowed by the lower court and disputed in appeal falls under schedule I Article 1. Whatever difficulties may exist in valuing it in the plaint there is no difficulty once the Court fixes the amount and the party appeals against the liability to pay the amount and files a memorandum of objections. So far as appeals against decrees for compensation under the Malabar Law Tenancy Improvements Act are concerned though the same considerations as urged in *Reference under Court Fees Act S. 5*¹ may be urged stamp duty is paid on the amount in dispute. This decision does not seem to have been followed. In *Sekharan v. Eacharan*² Munro and Abdur Rahim, JJ. were of opinion that though in a suit for redemption the stamp duty was by S. 7, Cl. 9 to be calculated according to the principal money expressed to be secured by the instrument of mortgage and the subject matter of the suit was the existence of the right to redeem any question as to the amount payable as the condition of redemption being regarded merely as incidental to that right, yet where the right to redeem is not called in question in the appeal and the only question is as to the amount payable the right to redeem cannot be said to be the subject matter in dispute, in the appeal memorandum but a definite amount payable and that the case fell within Article 1 Schedule 1, the court fee being computed on the amount in dispute. In *Reference under Court Fees Act*³

1. (1899) 1, L. R. 23 Mad. 84.

2. (1909) 20 M. L. J. 121.

3. (1905) 1, L. R. 29 Mad. 367.

it was held following *Nepal Rai v. Debi Prasad* ¹ that S. 7 clause 9 of the Court Fees Act applies only to suits and not to appeals and that in the case of appeals Article 1 of Schedule 1 applied, the Court fee payable being on the value of the subject matter in dispute.

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In *Hafiz Ahmed v. Sobha Ram* ² it was held that in suits for pre-emption where the vendee-defendants appealed on the ground that they were entitled to receive a larger sum than that awarded by the Court and that plaintiffs had estopped themselves from asserting the right by refusing to purchase, court fee was payable under S. 7, Cl. 6 on the value of the property as computed in Cl. 5, but that when the question in appeal relates solely to the amount to be paid by the pre-emptor his right to pre-empt not being challenged the proper Court fee was the amount calculated *advalorem* on the difference between the amounts alleged as the sale price on the one side and the other.

In *Nepal Rai v. Debi Prasad* ¹ it was held what when an appeal in a suit for redemption related solely to the amount payable the court fee payable on a memorandum of appeal was to be calculated according to the sum which the appellant claimed to have deducted from the decree and not as in the case of a suit for redemption according to the principal sum secured on the mortgage. Stanley, C. J., after expressing his dissent from the view taken in *Pirbhu Narayan Singh v. Scelha Ram* ³ observed "It appears to me, upon a perusal of S. 7 of the Court Fees Act and Schedule 1 to that Act, that in a case such as the one before me the court fee is to be calculated on the value of the subject matter in dispute only. S. 7, Sub S. 9 provides that in suits against a mortgagee for the recovery of the mortgaged property the court fee is to be valued according to the principal money expressed to be secured by the instrument of mortgage. The section is confined to a suit apparently, and not to an appeal. In Schedule 1 to the Act we find that in the case of a plaint or memorandum of appeal not otherwise provided for in the Act, except those mentioned in S. 3 an *advalorem* fee is payable at the rate mentioned in that schedule. In this schedule a memorandum of appeal is not

1. (1905) I. L. R. 27 All 447. 2. (1881) I. L. R. 6 All. 488.

3. (1890) I. L. R. 13 All 94.

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mentioned. Therefore I take it that if in the case of an appeal the value of the subject matter on the appeal can be determined, as it has been in this case, the appellant is only bound to pay a Court fee on the amount ascertained to be the value of the subject matter of the appeal". With these remarks I respectfully agree. This decision was followed in *Mahadeo Prasad v. Gorakh Prasad*,¹ and *Baji Lal v. Gobhardan Singh* ².

In *Basdeo Ban v. Sri Krishna Gir* ³, it was held that when a plaintiff prayed for an unconditional decree for possession as against a defendant who set up a mortgage executed by plaintiff's predecessor and a decree was passed for possession on payment of a certain sum and the plaintiff appeals against that portion of the decree directing payment he must pay *ad-valorem* stamp duty on the amount in question. The learned Judges (Chamier J. C. and Evans, A. J. C.) dissented from the decision in *Gourshir Singh v. Rajendra Bahadur* ⁴, and followed the decision in *Baji Lal v. Gobardhan Singh* ². A similar view was taken in *Mata Badal Singh v. Jai Singh* ⁵. *Ragha Sah v. Wajid Ali* ⁶, no doubt supports the petitioner's contention but no reference is made to any authorities. The only reason given is that if that decree dismissed the plaintiff's suit for possession the fee payable would have been only five times the land revenue and that as it was more favourable it cannot be larger. The facts of the case are also peculiar. The plaintiff prayed for possession and the Court passed a decree for possession but allowed the defendant to redeem and the decree for possession was only if the defendants failed to redeem. *Rup Chand v. Fateh Chand* ⁷ which was referred to, does not throw much light on the question. The plaintiff sued for possession as absolute owner and a decree was passed in his favour. On appeal the Subordinate Judge gave a decree for possession but limited the duration to the lifetime of the plaintiff's vendor. Against this decree the plaintiff appealed. It was held that a stamp duty of Rs. 10 was sufficient. Tudball J, observed "As matters stand now plaintiff appellant seems to me to be in the position of a person in possession of property who seeks to clear his title and to obtain a declaration that he has the full

1. (1908) 9 L. 30 All. 547.

2. (1909) 5 I. C. 941.

3. (1912) 16 I. C. 746.

4. (1909) I. L. R. 31 All. 265.

5. (1909) 2 I. C. 836.

6. (1919) 50 I. C. 353.

7. (1911) 8 A. L. J. 821.

right of ownership to the property". Treating the subject matter of the appeal as one to get rid of the limitation imposed by the Subordinate Judge it is difficult to see how it can be valued.

In *Lakhun Chunder Ash v. Khoda Buksh Mondul*¹ where a decree was passed in favour of the plaintiff but the Court directed payment in three instalments and the plaintiff appealed against that portion of the decree it was held that he was not bound to pay court fees on the sum decreed but on the difference between the amount claimed in the Court below and the sum of the present values of the three instalments payable on the dates mentioned in the decree. Banerjee J observed "Now, having regard to the provisions of Article 1, Schedule 1 of the Court Fees Act read with S. 16 of that Act, it is clear that an appellant is bound to pay a court fee on a Memorandum of appeal from a decree which gives him only partial relief, upon the difference between the values of the reliefs he claims to be entitled to and that granted by the decree appealed against".

In *Kishun Dutt Misser v. Kasi Pandey*² it was held by Coutts J, following *Basdeo Ban v. Sri Krishm*³ that when a decree awards possession on condition of the plaintiff paying the encumbrances on the property and the plaintiff appeals against that part of the decree the Court fee payable on the Memorandum of Appeal must be *advalorem* on the value of the encumbrances.

The current of authority is clearly in favour of the view that the value of an appeal is not in all cases the value of the suit as originally filed but the value of the relief granted by the decree which a party wishes to get rid of. In some cases the stamp duty may be more than that paid on the plaint and in some cases it may be less and in considering the effect of the provisions of S. 7 of the Court Fees Act and of Schedule 1 I do not think that this is a consideration which is of much weight.

I am of opinion that the Memorandum of appeal should be stamped on the amount which the respondent was directed to pay and which he seeks to escape liability from. He will have three weeks from this date to pay the deficient stamp duty.

C. A. S.

1. (1891) I. L. R. 19 Cal. 272.

2. (1920) 57 I. C. 481.

3. (1909) 5 I. C. 941.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—MR. JUSTICE OLDFIELD AND MR. JUSTICE RAMESAM.

A. T. K. P. L. M. Muthiah Chetti ... *Appellant* * (*Plaintiff*)

v.

Palaniappa Chetty and others ... *Respondents* (*Defendants* Nos. 1 to 4, 6, 7, 8 to 10, 11, 13 to 17) and
L. R. of 5th Respondent.Muthiah
Chetti.
v.
Palaniappa
Chetti.* *Limitation Act of 1908—Art 11—Applicability—Unsuccessful claimant—sue by—Limitation—Claim preferred and order therein made on the basis of an attachment—No attachment in fact—Effect—C. P. C. of 1908—O. 21, R. 63—“Party against whom an order is made”—Meaning.*

Defendants 5 to 10, who eventually obtained a decree for money against defendants 1 to 4, had, at an earlier stage in the suit, obtained a conditional order of attachment before judgment, but the attachment was never actually made. After obtaining the decree, defendants 5 to 10, in ignorance of the last mentioned fact, proceeded, as though there had been an attachment, to obtain issue of a sale proclamation. Thereupon, plaintiff, who was a hypothecatee of the properties under a hypothecation deed executed in his favour by defendants 1 to 4, equally in ignorance of the fact that no attachment had been made, claimed under O. 21, R. 62, C. P. C. a declaration that the sale should be subject to his rights as hypothecatee. His claim was, however, disallowed, without reference by the court or the parties to the absence of an attachment. He thereupon brought a suit, whether or not within a year from the date of the order disallowing the claim not being clear, for a declaration that the sale should be subject to his mortgage right. That suit was withdrawn with liberty, and, more than a year after the date of the order disallowing his claim, plaintiff brought another suit for recovery by sale on his mortgage.

Held, that the suit was barred under Art. 11 of the Limitation Act of 1908 whether or no there has been an attachment, if a party prefers a claim on the footing that there was an attachment, and submits the merits of his claim to the court for investigation, he is equally a person against whom an order is passed, which under O. 21, R. 63, C. P. C. will become final, if it is not displaced.

The principle applicable to such cases is that stated by Bowen L. J. in *Ex parte Pratt* (12 Q. B. D. 334). Plaintiff's resort to the claim procedure was only, a selection of one of two procedures available to him, and did not result in any entire diversion of the course of procedure or constitute an attempt to give the court a jurisdiction, which it did not possess.

Appeal against the Decree of the Court of the Temporary Subordinate Judge of Sivaganga in O. S. No. 91 of 1915.

C. S. Venkatachariar for appellant.

T. Rangachariar and E. Duraiswami Aiyar for respondents.

The Court delivered the following

Judgments :—*Oldfield, J* :—On the merits the question in this appeal is whether Ex. E, an hypothecation bond in favour of plaintiff appellant by the widows of two partners, Muthu and Raman Chetty, as guardians of 1st to 4th defendants, their minor sons, is without consideration and merely colourable or was executed in the words of S. 53 Transfer of Property Act with intent to defeat or delay creditors.

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The undisputed circumstances are that Ex. E hypothecates for its full value all the immovable property of 1st to 4th defendants; that plaintiff is the brother of one executant the widow of Muthiah Chetty; and that of the four other creditors of the firm, whose debts plaintiff was to pay as part of the consideration, one is a dayadi of plaintiff and a cousin of the widow of Raman Chetty and another is plaintiff's partner and nephew. Plaintiff had been an agent of the firm and knew that it had been declining in prosperity since the death of Raman Chetty in 1909. Ex. E moreover was executed just after 5th to 15th defendants, the contesting respondents, other creditors of the firm, who eventually obtained a decree against it for a little over Rs. 30,000, interest, and costs had at an earlier stage in their suit obtained a conditional order of attachment before judgment, of which plaintiff and the creditors may be supposed to have been aware, although the attachment was never actually made and, it may be added, is not relied on as invalidating this alienation. On these facts there is no doubt that the lower court was justified in imposing the burden of proof of the substantial character and good faith of Ex. E. on plaintiff.

That however did not entitle the lower court to require him, as it has done in respect of the greater part of the consideration and on other parts of the case, to discharge that burden with unreasonable strictness or to criticise his attempts to do so perversely. When for instance he had produced in support of Rs. 14, 300 which he was to pay to four creditors of the firm, entries in the firm's accounts, it was not justified in saying that, although these entries show that plaintiff and the others were entitled to money from the firm, it did not follow that they were so on the date of Ex. E. For in the absence of

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evidence of discharge the proved indebtedness at a comparatively recent date would presumably still be existing. Nor, when plaintiff admitted that his father had transactions with himself and 1-4th defendant's firm, was it reasonable, when no specific suggestion was made to him, to assume that the debt due to him might have been adjusted by transactions with his father and to refuse to reach a conclusion in his favour, because the possibility of such adjustment was not excluded by his evidence.

The accounts relied on by plaintiff were those of 1st to 4th defendants and the different debts were proved by them and by plaintiff and 1st to 4th P. Ws. Comment was made on the fact that the day books from 13-4-1904 to 13-1-1906 (Exh. J.) were missing. But no reason shown for attaching any special significance to this and after the latter date the account was continued on the footing that the debts were still outstanding. Item 2 due to V. E. S. Subramaniam Chetty is supported by numerous entries ; but there is none relating to it between 1906 and 1910, although there is none indicating its discharge in the interval. Item 5 due to K. S. S. Kasi Ramana Chetty was subject to interest at quarterly rests ; but no such rests are entered and there are in fact no entries of interest from fasli 1308 to 1310. No attempt however was made in cross examination to see whether any explanation was available on these points and they therefore cannot be considered now. The last named creditor accounted rather indistinctly for the manner, in which his debt was transferred in the accounts from the name of his wife and mother to his own ; but that goes no way towards showing that it was not due at all. No more serious objections have been made to this part of the case and we must therefore hold that these debts were due.

Next as to the evidence that plaintiffs actually made the payments directed by Ex. E, it is to be noted that, whatever the importance of his having done so as guaranteeing the substantial character and good faith of the transaction, his promise to pay in the absence of reasons for doubting his ability and intention to do so would be sufficient consideration to support it. Ex. F series however are the hundies, by which the payments are alleged to have been made ; and they are produced by plaintiff and are, except Ex. F-1 for the amount due to V. E. S. Subramania Chetty, duly discharged. As regards Ex.

F1 plaintiff deposed that its amount had been left with him in deposit by the Chetty's widow, and similarly he adopted the statement in evidence of 5th P. W. that the amount of his hundi also, Ex. F 3 had been deposited. It is not possible to follow the lower Court's suggestion that these or any of the payments can be collusive, when plaintiff's evidence constitutes a clear acknowledgment that he holds these two payee's money for them and the endorsements on the other hundis, the genuineness of which is proved and is not disputed clearly discharge the debts due by 1st to 4th defendants' firm, its Vilasam being specified in their body. The lower court's objections that three of these hundis are not in plaintiff's usual printed forms and their covering letters and plaintiff's accounts are not produced are merely captious, when their discharge, and in the case of Ex. F-1 and F-3, plaintiff's acknowledgment that he holds the money due for those concerned are considered. Here again the conclusion must be in plaintiff's favour that the payments relied on are established.

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The remaining item of consideration is Rs. 1,800, described in Ex. E. as advanced in cash for family expenses. There is only the general evidence of plaintiff and 3rd P. W. that part of it was spent on Raman Chetty's funeral and as regards necessity that the assets of the firm were all realized and spent in Rangoon. No accounts for the details of this expenditure have . . . been produced. In these circumstances it is not possible to find that it has been established. The conclusion must therefore be that consideration passed for Ex. E, except this small item of Rs. 1800 ; and 5th to 10th defendants' case that the document was a mere pretence and that there was no intention to create rights by means of it, must fail.

To turn to the application of S. 53 Transfer of Property Act, there is no doubt no definite evidence of the existence of any creditor besides 5th to 10th defendants and those, who have been paid by Ex. E. The suspicions of the lower court, based on the date of the purchase of stamp papers and the 12 per cent. rate of interest, which it thought oppressive but which is in fact high, but not exceptional, have not been shown to be well founded. We have then no doubt a transaction, which exhausted the executant's assets for the sole benefit of some only of their creditors including, it is true, three close

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relatives, of whom one brought it about at a time of pressure on the estate. But, there being no question of insolvency, that is not sufficient. For, to follow the latest authority, *Musahar Sahu v. Lala Hakim Lal*¹ although Ex. E. prefers some creditors to others, it is not an instrument which removes property from the creditors to the benefit of the debtor and, after the foregoing finding, there is no ground for impeaching it in the fact that the 5th to 10th defendants' creditors were losers by payment being made to a preferred creditor, the plaintiff. On the merits therefore plaintiff is entitled to succeed.

5th to 10th defendants have however resisted his claim on another ground. Reference has already been made to the fact that, although a conditional attachment before judgment was ordered, none was actually made. This is said to have been due to delay in payment of fees. But neither plaintiff nor 5th to 10th defendants were, so far as appears, aware of the fact; and the latter proceeded, as though there had been an attachment, to obtain issue of a sale proclamation whilst the former in Ex. VI claimed under O. XXI, R. 62, C. P. C., a declaration that the sale should be subject to Ex. E. Thereon, without reference by the court or the parties to the absence of an attachment, plaintiff's claim was disallowed under Ex. VI (a) on 15-4-1912. A sale was held and delivery was given, as Ex. VII shows, on 2-1-1913. As to plaintiff's next step the only information before us is given by his present plaint, that he brought O. S. No. 56 of 1913 for a declaration that the sale should be subject to his mortgage right. Whether this suit was brought within one year of Ex. VI (a) and whether plaintiff would have been well advised to ask for leave to amend and include a prayer for other reliefs in it is not clear. But in any case he withdrew it, obtaining leave in Ex. AA to sue again, and he then brought the present suit for recovery by sale on his mortgage on 7-10-1915. 5th to 10th defendants contend that as this suit is brought one year after Ex VI (a) it is barred under Art 11, Sch. 1, Limitation Act the rejection of the claim having become final under order XXI, R. 63.

The suggestion that Ex. AA is a recognition, binding on the lower or this court of plaintiff's right to bring his present suit can be dismissed shortly, because such recognition

1. (1918) 1. L. R. 43 Cal. 521.

is not entailed by the wording of that order and would not have been within the power of the court, which passed it. So also the lower court's ground of decision that with reference to *Bhiku v. Shaujah Ali* ¹ and *Ganesh v. Damoo* ² Art. 11 is not applicable to plaintiff's suit, brought to recover a debt on the security of the property, not to establish any right in it. For in the first of these cases the question was not of an ordinary claim petition, based like Ex. VI on a mortgage, but of a petition to remove obstruction to delivery under, S. 335 of the Code then in force corresponding with O. XXI, Rr. 100, 101; and there was nothing to bar the subsequent suit so far as it related to a different relief, the recovery of the sums due, which was asked for in the alternative and which the court considered. The second authority relied on proceeded on the grounds first, that the order in question was not on a claim, but was passed under S. 287, corresponding with O. XXI, R. 66, and next that an order refusing to recognise a mortgage and continuing an attachment free from it is not one, which must be displaced by the suit contemplated in Art. 11. But the latter conclusion is opposed to *Nemaganda v. Paresha* ³ which with all deference is not susceptible of the explanation proposed in the decision under consideration; and it is impossible to understand how an order disallowing *in toto* the mortgage right claimed is not as essentially an adverse order of the kind contemplated in O. XXI R. 63 as one continuing the attachment subject to the mortgage instead of releasing it altogether.

The more serious argument for plaintiff is however that, as there was in fact no attachment, the claim proceedings were founded on a mistake of the court and both parties and therefore had no legal effect or resulted at most in an order, which may have been a nullity, since it was not one contemplated by the Code, and was in any case not subject to O. XXI, R 63 or Art. 11; and it is suggested further that, as plaintiff was induced by 5th to 10th to defendant's misrepresentation, even if it was unintentional, to embark on this course of procedure, the latter cannot benefit by the prejudice which results from their own conduct. This suggestion however is untenable. Plaintiff, no doubt, may have inferred from the sale proclamation issued at 5th to 10th defendant's instance, which he mentioned

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1. (1901) I. L. R. 29 Cal. 25.

3. (1916) (18 Bom. L. R. 782),

3 (1898) I. L. R. 22 Bom. 640.

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in Ex. VI. that there had been an attachment in the ordinary course. But there is no question of fraud on their part and, when it was opened to him to verify his inference by enquiry and he failed to do so, the fault was his own. In consequence of this failure, he thought himself entitled to choose the cheap and speedy remedy afforded by the claim procedure in preference to the ordinary suit, subject to no special limitation, by which alone he could otherwise have proceeded; and he presumably had regard to his own advantage in his choice. 5th to 10th defendants' subsequent omission to plead that there was no attachment, was not an invitation to plaintiff to continue in the course he was taking, but merely an acquiescence in his doing so, by the consequences of which they would equally with him have been bound, if the result on the merits had been against them. The fact is simply that, plaintiff having submitted his claim to the court in circumstances, which did not strictly authorize his doing so, and 5th to 10th defendants having waived an objection, on which they might have relied, both gave an implied consent to the investigation proceedings.

The principle applicable to such cases was stated generally by Bowen L. J. in *Ex parte Pratt* (XII Q. B. D. 334), as being that no one has a right so to conduct himself before a tribunal, as if he accepted its jurisdiction, and then afterwards, when he finds that it has decided against him to turn round and say "you have no jurisdiction." This no doubt is subject to exceptions, those with which we are at present concerned being, to adopt the description of them in *Pisani v Attorney General for Gibraltar*¹ that departures from ordinary practice by consent will not nullify the proceedings or divorce them from the ordinary incidents of procedure (in that case a right of appeal)" unless there is an attempt to give the court a jurisdiction, which it does not possess, or something occurs, which is such a violent strain on its procedure that it puts it entirely out of its course." It was held accordingly in *Toronto Railway v. Toronto Corporation*² and *Deno Nakh Batabyal v. Nohor Chander Sethi*³ that the parties consent did not enable the court to deal with issues outside the scope of its statutory powers; and in *Ex parte Pratt* already referred to, *Ex parte May*

1. (L. R. 5 P. C 516).

2. (1904) A. C 809.

3. (1901) 4, C. W. N. 470.

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(XII Q. B. D. page 497) and *Vishnu Lakharau Nagarkar v. Krishnarao Malhar* ¹ that, the opposite case, where jurisdiction over the subject matter exists, requiring only to be invoked in the right way, the party who invited or allowed the court to exercise it in the wrong way cannot afterwards challenge the legality of the proceedings, due to his own invitation or neglect. One instance of entire diversion of the court's procedure from its course may be given, because it is significant in the present connection. In *Joy Prokas Singh v. Abhoy Kumar Chand* ² claim proceedings without a preceding attachment were treated as a nullity, not on any ground such as plaintiff here relies on, but because the decree under execution for sale on a mortgage and recognition of a claim would *pro tanto* have deprived the mortgage decree of its effect otherwise than in the regular suit contemplated by the law.

It is clear that plaintiff's resort to the claim procedure in the present case is within neither of these classes of exceptions. For it did not result in any entire diversion of the course of procedure, but only in the selection of one of two procedures, which were available instead of the other; and there has been no attempt to give the court a jurisdiction, which it did not possess since its general power to deal with claims is not disputed. It is urged on the latter point that reference to its general power is an insufficient ground of decision because that power is not general or inherent, but derived only from statutory provisions and must be exercised only in accordance with them; that is, in the event specified in O. 21, R. 58 (1) of an attachment having been made. But a similar objection was, it is to be observed, available in *ex parte Pratt*, *Ex parte May* and *Vishnu Satharam v. Krishna Rao Malhar* ¹ already referred to and the fact that statutory powers were in question was not considered. In *Angan Lal v. Gutlarmal* ⁴ an order appropriate to a claim petition was no doubt set aside on the ground among others, that there had been no attachment. But the facts there were peculiar, since there had been no submission by both parties to the court following the claim procedure and the court entered on it in disregard of the petitioners' averments. In fact, cases of mistake and acquiescence such as plaintiff's must be rare, since the absence of an attachment will seldom be overlooked, in the

1. (1896) I. L. R. 11 Bom. 153.

2. (1897) 1 C. W. N. 701.

3. (1888) M. L. R. 10 All. 479.

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first instance or when evidence is adduced under R. 59. But in dealing with them it must be remembered that in accordance with *Sheodhyan v. Bholanath*¹ and *Sivakolandu Pillai v. Ganapathy Iyer*² the absence of an attachment will not make a court sale illegal as between the parties to it and persons like plaintiff, whose interest is affected by it, but is merely an irregularity, on account of which the sale can under O. 21, R. 90 on proof of substantial injury be set aside on their application and the reason is, as the former decision explains, that the object of attachment is only to bring the property under the control of the court in order to prevent its alienation, the actual proclamation being the notice to the public that the sale is to take place. This is so in spite of the explicit reference to attachment on O. 21, R. 64 and it is not necessary or possible to regard attachment where it is similarly referred to in O. XXI R. 58, as essential to the jurisdiction of the court. For there also the existence or absence of a previous prohibition against alienation by the judgment-debtor cannot affect the court's power to deal with the claim of those who, like plaintiff, have notice from the proclamation that their rights are in peril; and accordingly, whether or no there has been an attachment, they are, if they submit the merits of their claims to the court for investigation, equally persons against whom an order is passed, which under O. 21 R. 63 will become final, if it is not displaced.

In these circumstances the conclusions must be that Art. 11 Sch. 1 Limitation Act and O. 21, R. 63 apply. The appeal must therefore be dismissed with costs of 10th to 13th Respondents.

Ramesam, J.—I agree and have nothing to add.

A. S. V.

Appeal dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE RAMESAM.

The Great Indian Peninsula Rail-

way Company, Ltd.

... *Appellant * in Full Bench Application No. 185 of 1920 on the file of the Court of the Small Causes, Madras.*

v.

Chella Ram Gianchand

... *Respondent in Full Bench Application No. 185 of 1920 and plaintiff in S. C. No. 9171 of 1920.*

Indian Railways Act IX of 1890, S. 75 and Schedule II (m) and (s)—Shawls within the meaning of schedule—Whether should be of special value—Liability of Railway administration as carrier—"Special value" in S. 75, marginal note, and in the second Schedule, effect of.

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Where the plaintiff sues a Railway Company for the loss of shawls given to them for being carried, it is immaterial that the particular shawls which were lost were not Cashmir Shawls nor made of wool nor articles of comparatively high value, provided that the value of the articles in the parcel exceeded Rs. 100 in all and they were shawls.

The use of the words "special value" in the marginal note to S. 75 and cl. (s) of the second schedule does not imply that only articles falling within the descriptions of the schedule which are of exceptional value must be declared under S. 75 of the India Railways Act. *Sudarshan Maharaj Nandrum v. East Indian Railway Company* (1) followed *Sarat Chandra Bose v. Secretary of State for India* (2) followed.

Case referred by the court of Small Causes, Madras under S. 69 of the Presidency Small Cause Courts Act 1882 in Full Bench Application No. 185 of 1920 (S. C. Suit No. 9171 of 1920) on the file of the court of Small Causes, Madras, for the opinion of the High Court as to the proper construction of the terms "shawls" as defined in the Indian Railways Act IX of 1890.

D. Chamier instructed Brightwell and Moresby for appellant.

Respondents did not appear.

The Court delivered the following

Judgments :—*Spencer, J.*—I agree with the majority of the judges of the Small Cause Court and with the decision in

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Spencer J.

Sudarshan Maharaj Nandrum v. East Indian Railway Company ¹.

The plaintiff described the articles in respect of which he made his claim as "shawls" and in my opinion it is a consideration of no consequence that the particular shawls which were lost were not Kashmir shawls, nor made of wool nor articles of comparatively high value provided that the value of the articles in the parcel exceeded Rs. 100 in all.

The use of the words "special value" in the marginal note to S. 75 of Act IX of 1890 and in clause (s) of the second schedule in my opinion must not be taken to imply that only articles falling within the descriptions of the schedule which are of exceptional value, must be declared.

As pointed out by Mr. Justice Stuart in *Sudarshan Maharaj Nandrum v. East Indian Railway Company* ¹ the words "lace" "watches" and "Government stamps" may include articles of comparatively small intrinsic value.

Generally speaking all the articles in the list are articles which may have a special value; and it is for that reason that it was found necessary to secure Railway companies from exaggerated claims being made after the loss or destruction of parcels by enacting that all articles of these classes should be declared, so that the Railway Company may know before they undertake the conveyance of them to what extent they will be liable in the event of the articles being lost or destroyed, and to enable the Railway Company to recoup themselves for the special care and risk that attends the carriage of articles that may in many cases be valuable articles by levying a higher rate for such parcels.

Ramesam, J.

Ramesam, J. :— I agree. The only question to be decided in this reference is whether the goods consigned are "shawls". If they are "shawls" S. 75 of the Indian Railways Act applies and the plaintiff is not entitled to recover. If we are to interpret the term "shawl" with reference to the restricted sense (No. 1 given by Murray) it will be confined to (Cashmir) shawls and I do not see how it can cover shawls of high value but made of material other than the hair of the Kashmir goat as Dr. Pandalai seems to think.

1. (1919) I L. R. 42 All. 76.

Again I do not think we are at liberty to interpret the term "shawls" with reference to the use of the phrase 'articles of special value' in the marginal note to S. 75 and in cl. (s) of the second schedule. With great deference to the learned judges who decided the case (*Sarat Chand Bose v. Secretary of State for India* ¹.) I am unable to agree with their reasoning. It may be that that case is correctly decided, if Alwans are not 'shawls'. Dr. Pandalai seems to think that, if the extended sense of the term as given in the dictionaries (Murray and Webster) is allowed to control the meaning of the term as used in the Act, there will be "a revolution in the conditions of carriage of textiles in India." I do not think there is any ground for this apprehension. The second or extended sense as given in the dictionaries is not a definition (in the sense that one can substitute it for the term as its equivalent but only an attempt to give a description so as to show that the restricted sense has been latterly departed from. If the second sense as given by Murray or Webster is taken as definition every piece of upper cloth used by the middle classes in Southern India (almost always made of cotton) will be a shawl, but I do not think they will ever be held to be "shawls" within the meaning of the Act. In each case it must be found whether the goods are known as "shawls". In this case there is no doubt that the goods lost are *shawls*. It is at this stage that the description of the goods in the plaint is of help. I am not to be understood as saying that the plaintiff is estopped by his own language in the plaint from contending that they are not shawls. If as a matter of fact, the plaint description is erroneous, he may be at liberty to show it. But in this case it is clear that it is not erroneous and that his description is in perfect consonance with the extended use of the term as given in the dictionaries. In this case, therefore, there is no doubt that the goods lost are "shawls" and the plaintiff is not entitled to recover.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR WILLIAM AYLING, OFFICIATING CHIEF JUSTICE, AND MR. JUSTICE ODGERS.

Gontu Appireddi ... Appellant * (5th Respondent).

Gontu Chinna Appireddi ... Respondents (Petitioners—Respondents 1 to 4 and creditors 3, 4, 6 to 8).

Appi Reddy

Chinna Appi Reddy.

Provincial Insolvency Act V of 1920, Ss. 6 (b), 27 (1) and 53—Creditor's petition for adjudication on a transfer with intent to defeat creditors—Order of adjudication in insolvency and cancellation of the transfer—Whether the order of cancellation is rightfully made—Application for cancellation only after appointment of Receiver and by him—Creditors right arises only when the Receiver fails to move.

Where an application is made to adjudicate the debtors as insolvents on a transfer of their property with intent to defeat or delay creditors and the Court made the order of adjudication and ordered the cancellation of the transfer deed by the same order held that the court ought not to have ordered the cancellation of the transfer deed at that stage.

A proceeding to set aside a transfer in insolvency should be taken in the name of the Receiver and it is only when the Receiver fails to move in the matter that a creditor may do so. *Hemraj Champa Lal v. Ramkishen Ram* (1) and *Kamleshwar Ram v. Bhavan Prasad* (2) and *Bikkamal v. Marwar Bank* followed.

Appeal against the order of the District Court of Guntur, dated 13th March 1920, in Insolvency Petition No. 1 of 1919.

V. Ramadoss for appellant.

N. Rama Rao for respondent.

The Court delivered the following

Judgments:—In this case two creditors of one Chanda-varam Ramayya and his three undivided sons (Respondents 1 to 4) petitioned (i) that they might be declared insolvents (ii) that certain alienations made by Respondents 1 to 4 in favour of the 5th Respondent might be declared invalid and cancelled. The alienations took place about a month before the presentation of the petition which is dated 20th December 1918. The learned District Judge heard the petition of 19th March 1920 and in the same order not only adjudicated Respondents 1 to 4 insolvents but declared the sale deed which witnessed the alienations cancelled. The act of insolvency alleged and

A. A. O. No. 177 of 1920.

14th September 1921.

1, (1917) 2 Pat. L. J. 101

2 (1917) 42 I. C. 845

3. (1919) 52 C. 188.

proved against the respondents 1 to 4 was these alienations under S. 6 (b) of the Provincial Insolvency Act (V of 1920) *i.e.*, they were held to be transfers with intent to defraud or delay creditors. The petition was presented under S. 7 and the debtors were adjudicated under S. 27 (i) which runs thus.—“If the Court does not dismiss the petition it shall make an order for adjudication.” There is of course no doubt that the learned District Judge was justified in making the order of adjudication but the question is was he right in going further and ordering the cancellation of the sale deeds in the same order. He apparently held a detailed enquiry to which the vendor was a party: whereas one would ordinarily expect that a much more summary procedure would in the first instance meet the case. The question is governed by S. 53 of the act which provides that such transfers as are therein specified “shall be voidable as against the receiver and may be annulled by the Court”. The section certainly contemplates action by the Receiver. It is true that at the time the order for cancellation was made the Receiver had not been appointed, but he was appointed later on the same day. In *Hemraj Champa Lall v. Rankishen Ram*¹ it was held that until the Receiver refuses or declines to act no one else can do so because he is the person to set the proceedings under S. 36 (now S. 53) in motion.

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We are inclined to respectfully adopt this decision. The other cases cited can be shortly dealt with. In *Kamleshwar Ram v. Bhavan Prasad*² the Allahabad High Court held that a proceeding to set aside a transfer should be taken in the name of the Receiver and that no proceeding should have been commenced (by the creditors) until after the appointment of a Receiver. It may well be that when the Receiver fails to move in the matter a creditor may do so (*Bikkamal v. Marwar Bank*³). Even there the Court held that in a case of fraudulent preference the Receiver should either apply or be a party to the application. The judgment in *Krishalli Ram v. Bholaimal*⁴ does not deal with this question at all but simply with the jurisdiction of an Insolvency Court. There the Judge had referred a

1. (1917) 2 Pat. L. J., at p. 101,

3. (1919) 52 I. C., 188.

2. (1917) 42 I. C., 845,

4. I. L. R. 37 All., 252.

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creditor alleging a fictitious mortgage, to a suit instead of enquiring into the question himself as the court held he was bound to do. It does not appear whether or not a Receiver had been appointed in that case. S. 4 of the Act which was quoted for the respondents is inserted for the purpose of putting an end to the conflict of decisions as to whether proceedings in the Insolvency Court constitute *res-judicata* or not.

It appears to us that what authority there is all points one way, viz., that it is for the Receiver to take action under S. 53 and not for the court to do so on a petition for adjudication. We accordingly set aside that part of the District Judge's order which relates to the cancellation of the sale deeds to the 5th respondent.

No costs in this court.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
(FULL BENCH.)

PRESENT :—SIR WILLIAM AYLING, OFFICIATING CHIEF JUSTICE, MR. JUSTICE OLDFIELD, MR. JUSTICE KUMARASWAMI SASTRI, MR. JUSTICE RAMESAM AND MR. JUSTICE ODGERS.

Appanna Poricha ... *Appellant* * (1st Defendant.)
v.

Narasinga Poricha and others ... (*Plaintiff Respondents. Defendants Nos. 5 to 37.*)

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C P. C. of 1908—S. 92—Scope and applicability—Hereditary trustee—Suit against hereditary co-trustees for (1) joint possession of trust properties (2) framing a scheme for enjoyment in turns, and (3) an account of trust properties in defendant's hands—Sanction under S. 92—Necessity—S. 92, Sub-S. (2)—Object and effect.

By the Full Bench.—In a suit by a hereditary trustee against his co-trustees praying, *inter alia*, for an account of the trust properties in their hands the plaintiff is entitled to have such an account taken, even though the suit is not instituted under S. 92 of the Code of Civil Procedure, 1908.

S. 92 governs suits for the vindication of the rights of the public in public charitable trusts and has no application to suits for the vindication of the rights of management by hereditary trustees or to disputes between such trustees *inter se* as to their turns of management.

The addition of Sub-S. (2) in 1908 was intended, not to alter, but to make explicit, the law as stated in Sub-S. (1) and S. 539 of the previous Code; and the law so stated did not affect the right of a trustee, as opposed to beneficiaries, to sue a co-trustee in discharge of his duty to his trust.

By Wallis, C. J. and Krishnan, J.—In a suit by a hereditary trustee against his hereditary co-trustees praying for (1) joint possession of the trust properties.

and (2) the framing of a scheme for enjoyment in turns, *held* that plaintiff was entitled to such joint possession, but that he was not entitled to have such a scheme settled except in a suit instituted under S. 92, C. P. C. of 1908.

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Appeal against the decree of the District Court of Ganjam in Original Suit No. 6 of 1917.

P. Narayanamurthi, vakil for the appellant.

C. S. Venkatachariar, vakil for the 1st, 12th, 13th, 18th to 24th, 26th to 28th and 32nd to 34th respondents.

K. Kamanna, vakil for the 2nd to 6th, and 8th to 10th respondents.

The Court (Sir John Wallis, C. J. and Krishnan, J.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—

This is an appeal from the judgment of the District Judge of Ganjam in a suit brought by the plaintiff against the 1st defendant and other members of the Poricha family for a declaration that the plaintiff is entitled to joint possession of the suit temple lands and topes as a co-trustee and for a decree awarding him joint possession with the defendants. He also asks for an account of the profits of the temple lands and topes in the possession of the defendants and that they should be ordered to make over the amounts due from them for the use of the temple. He further asks that a scheme may be settled so as to provide a yearly turn for each of the seven branches of the family of the plaintiff and the defendants and also prays for the recovery of a certain sum of money which he claims to have advanced for the use of the temple.

The main question in the case is whether the plaintiff has established his title as a co-trustee of the plaint temple. There is no doubt that the suit Mutt or temple was founded by one Ramakrishna Poricha, of whom the plaintiff and the defendants are descendants, and it is equally clear that the affairs of the temple have been managed in the main for many years by Limmair Poricha, the father of the 1st defendant, who died in 1897, and since his death by the 1st defendant. The case for the 1st defendant is that by the usage of the institution the trusteeship descends to the eldest member of the eldest branch. The District Judge has held that this usage is not made out, and after hearing lengthy arguments and examining carefully both the oral and the documentary evidence in the case, we have

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come to the conclusion that there is no sufficient reason for differing from the District Judge's finding.

The key to the proper understanding of this case appears to be this, that the family have been discharging the duties of archakas of the suit Mutt or temple, and as there are no other trustees, they are also the trustees of the temple, and have been, as proved by the evidence, largely living on *prasadams* of paddy from the temple lands. When we examine all the inam deeds together, we find that one member of the family is entered as the *dowledar*, that is, the person whose name was inserted in the last *dowle* before the Inam Commission and that the names of the enjoyers are given as Mutt Archakas in one case and as Adhikaris in other cases, and that in those Inam statements representatives of all the seven branches are named as being in enjoyment of the Inam. There is also very strong evidence in Exhibit G (page 12), Col. 12, under the heading "Particulars of the present enjoyers," the entry is "performing the *archana* of Sri Swami, the members of the family referred to in Col. 6 have been enjoying the offerings jointly." This entry strongly supports the conclusion which we have come to that they were really archakas who were also trustees and supported themselves out of these lands.

There is no doubt that the 1st defendant and his father have practically been left very largely in management of the suit lands. That is apparent even from the inam records and if that evidence stood alone it might be sufficient to warrant us in holding that the usage of descent by primogeniture was established: but it does not stand alone. Not only are there these important entries in the Inam records but there is other evidence which shows the interference by the other branches of the family, which cannot be explained consistently with the trusteeship being vested in the 1st defendant solely. We refer to Exhibit F which is a *muchilika* in 1883 taken from the tenants in the name of the members of all the branches; Exhibit IV in 1887 and Exhibit V in 1897 are purchases for the temple in the names of all the branches. This is very strong evidence indeed that the trust was really a joint one though the management was left very largely in the hands of one of the members.

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Then we have in 1906 kist receipts Exhibits IX series, and Exhibit A, a statement taken in the land acquisition proceedings in 1909 when they all put in a proposal that the compensation money should be used in purchasing lands for the Mutt in the name of all. That again is a very strong recognition that all the property was owned by all of them jointly on trust. There is therefore no reason to interfere with the finding of the District Judge in that respect.

The District Judge has found that the plaintiff is entitled to recover a sum of Rs. 20 a year for expenses incurred on behalf of the temple. It is not disputed that the sum really spent was Rs. 60 a year and therefore the sum claimed by the plaintiff on this head must be recovered by him at the rate of Rs. 60 a year out of the trust property in the hands of the defendants.

There are numerous branches of this family and one of the reliefs claimed by the plaintiff is the framing of a scheme for enjoyment in turns. We are disposed to think that he is not entitled to have such a scheme settled except in a suit instituted under S. 92 of the Civil Procedure Code. The plaintiff also asks for joint possession of the trust properties and as a trustee he is entitled to such a joint possession, as held by this Court in *Meenakshi Achi v. Somasundaram Pillai*¹ and recently in Appeal Suit No. 368 of 1919. He also asks that the defendants should render accounts of the profits of the temple lands in their possession and make over the amounts due from them for the use of the temple that is to say he asks for an account of the movable property of the temple in the hands of the defendants, the other trustees, and the question is whether he is entitled to have such an account taken in a suit not instituted under S. 92 of the Code of Civil Procedure.

On this point there seems to be some difference of opinion in this Court. On the one hand, according to the view expressed in the appeal we have just referred to, that section is not intended to interfere with the rights of a hereditary trustee to possession and control of the trust property for the purpose of discharging the duties of a trustee which are imposed in the exercise of his trust. On the other hand, at least one of the judgments in *Venkatasubbamma v. Venkutarangam Chetty*,²

1. I.L. R 44 M. 205.

2. (1916) 31 M. L. J. 280.

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appears to proceed upon the view that in so far as a suit against a trustee prays for any of the reliefs specified in the first part of that section, the second part of the section forbids such a suit to be brought except under the section. The learned Judge admits that the hereditary trustee must lose his rights if such leave to sue under the section is refused, but is of opinion that this is what the legislature has deliberately enacted on larger grounds of policy. There is some indication of the same opinion in *Subramania Pillai v. Krishnaswamy Somayajiar* ¹. The question of course depends upon the true interpretation of the second part of S. 92—whether the terms of that section are so imperative as to prohibit any suit against a trustee in which any of the reliefs specified in the section are sought even though those reliefs are sought, not in the larger interest of the public and the charity, but merely for the purpose of vindicating the private rights of one of the trustees and of enabling him to discharge the duties and liabilities which are imposed upon him by his trust. It is ordinarily the duty of a trustee to get in the trust funds and to see that they are in proper state and custody and investment and therefore ordinarily a trustee would be entitled to sue for accounts against his co-trustee for the purpose of making him replace the trust funds and would be bound to institute such a suit. The question is whether the terms of the section are so imperative that they must be considered to prohibit him from instituting such a suit without the sanction of the Advocate-General or the Collector under S. 92 of the Code of Civil Procedure. This question is undoubtedly one of considerable importance and it is also a question on which divergent views may be taken and therefore we think that it is eminently a question which should be settled so far as this Court is concerned by the decision of a Full Bench. Before disposing of this case we have decided to refer to a Full Bench the question whether the plaintiff is precluded by the terms of S. 92 of the Code of Civil Procedure from obtaining a decree for an account against the defendants (co-trustees) in this case.

The memorandum of objection filed by defendants 2 to 6, 8, 9 and 10 is dismissed with reference to the occupancy rights claimed by them. The question of their costs is reserved.

¹. (1918) 1. L. R., 42 Madras 668.

G. Lakshmanna for P. Narayanamurthi, for the Appellant.

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K. Ramamurti and K. Kamanna, for the 2nd to 6th, and 8th to 10th respondents.

The Court expressed the following

Opinion:—*The Officiating Chief Justice*.—I have had the advantage of persuing the judgment which my learned brother Oldfield is about to pronounce. I agree with the views expressed therein and with the negative answer proposed by him to be given to the question referred to us, and I should not feel called upon to add anything, but for the judgment in *Swaminatha Pillai v. Sundaresa Pillai*,¹ to which I was a party, which has been relied on by the learned vakil for appellant as supporting his contention.

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The case is, of course, distinguishable from the one with which we are concerned. This is a case between co-trustees : that was a case in which a subordinate trustee was sued by a general trustee, who, as representing the general trust, was really a beneficiary under the subordinate trust, and was seeking, as such, to enforce fulfilment of the latter.

It was from this point of view and in reference to a suit of that character that the last paragraph of the judgment in that case was written : and was so worded as to suggest a more general application than I think we had in our minds. The argument addressed to us (and rejected) was apparently that every suit by a trustee no matter of what nature or against whom directed—was exempted from the provisions of S. 92. This was also, I think, the proposition placed before the Bench in *Subramania Pillai v. Krishnaswami Somayajiar*² and dealt with by Abdur Rahim J. in the last paragraph of his judgment.

The correctness of our decision on the facts of the case then before us is unnecessary to discuss. *Nellaiyappa Pillai v. Thangama Nachiar*³ was an authority the other way : but one which did not bind us sitting as a Bench of three Judges in

1. 29 M. L. Tr 267.

2. I. L. R. 42 M. 668,

3 I. L. R. 21 M. 403,

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a Letters Patent appeal. But I feel bound to say that on reconsideration and in the light of the argument now addressed to us, I do not think that the applicability of that judgment was affected by reason of the introduction of clause (2) of S. 92. I agree with my brother Oldfield's view of the intention and effect of the inclusion of that clause : and I may go so far as to say that if a case similar to *Swaminatha Pillai v. Sundaresa Pillai*¹ came before me again I should like to hear the question of the applicability of S. 92 re-argued, and should be prepared to reconsider my views.

I would answer the question referred to us in the negative.
Oldfield, J.

Oldfield, J. :—The question for decision is in effect whether the plaintiff, suing as a trustee, is precluded in the absence of the sanction referred to in S. 92 of the Civil Procedure Code from obtaining a decree for an account against his co-trustees, the defendants, in this suit. We therefore are not concerned with his right to the other relief he has asked for or in particular to the framing of a scheme.

It is argued on behalf of 1st defendant that such a sanction is essential, because, an account being specified in S. 92 (1) (d) as one of the reliefs, which can be claimed in a suit under the section, with reference to sub-sec (2) no further reason need be required for holding that an account can be claimed only in a suit instituted in conformity with sub-S. (1) ; and no doubt a literal reading of the reference in the former to "a suit claiming any of the reliefs" specified in the latter at first sight supports this conclusion. But neither it nor the authorities relied on by 1st defendant take account of the considerations, which have been urged before us and which in my opinion must prevail :—that the addition of sub-S. (2) in 1908 was intended, not to alter, but to make explicit the law as stated in sub-S. (1) and S. 539 of the previous Code, and that the law so stated did not affect the right of a trustee, as opposed to beneficiaries, to sue a co-trustee in discharge of his duty to his trust.

Those authorities can be dealt with shortly.

Second Appeal No. 1935 of 1914 (unreported) was decided on a mere reference to sub-S. (2) without discussion of its

1. (1919) 29 M. L. R. 267.

scope. *Swaminatha Pillai v. Sundaresa Pillai* ¹ was a suit by a trustee and the Full Bench held, following the case next to be referred to, that the addition of sub-S. (2) rendered the statement of the law in *Nellaiyappa Pillai v. Thangama Nachiar* ² incorrect. Whether or no that was right, it is immaterial for the present purpose, because those decisions were not between co-trustees, but between the trustee of a principal institution and the trustee of its subsidiary trust and the former may have been regarded as suing on behalf of his institution and those interested in it. *Subramania Pillai v. Krishnaswami Somayajiar* ³ and *Venkatasubbamma v. Venkatarangam Chetty* ⁴ no doubt are based on the literal application of sub-S. (2), for which 1st defendant contends. But, if the former can be regarded as really a suit against trustees for their removal (and I share the doubt expressed in *Nilkanth v. Ramkrishna* ⁵ whether it can be) there is nothing in it regarding the question now before us except a bare reference to the terms of the section and no consideration of the character of the plaintiffs as trustees, and not beneficiaries. *Venkatasubbamma v. Venkatarangam Chetty* ⁴ is more important, because the judgment under appeal had negatived the necessity for a sanction on the ground now relied on by Plaintiff. But one learned Judge said nothing on the point and the other, after referring to it, confined his attention, as defendants contend that we should do, to the bare description of the relief claimed and its identity with one of those enumerated in sub-section (1) without considering whether the section as a whole applies only to suits by beneficiaries or also to those brought by trustees. It is true that after doing so he referred to the inconvenience involved in compliance with the provisions of S. 92 by a trustee, justifying it as not insuperable and as entailed by the general policy of the Legislature. But the necessity for such compliance might, if the Advocate General would not move on a trustee's relation or would not consent to his suing, preclude his doing so altogether and it would involve in any case the anomaly of his joining as co-plaintiff some second person possessing a more general interest than his own. With all deference a construction which avoids those difficulties, is, if otherwise legitimate, to be

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1. 29 M. L. T. 267.

2. I. L. R. 21 Mad. 406.

3. I. L. R. 42 Mad. 668.

4. 31 M. L. J. 280.

5. I. L. R. 23 Bom. 876.

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preferred; and the policy of the Legislature on the point is not clear enough to influence the decision in the direction proposed.

Neither of the learned Judges in *Venkatasubbamma v. Venkatarangam Chetti* ¹ referred to the state of the law before 1908 or the extent to which it was then altered by the addition of sub-S. (2). On the first point 1st defendant relies on *Tricumdass Mulji v. Khimji Vullabhdas* ² in which sanction under S. 539 of the Code then in force was held essential for a suit between co-trustees. But the judgment lays no stress on the plaintiffs possession of that character; and the fact that it was founded on *Subbayya v. Krishna* ³ in which the plaintiffs were trustees, is not material, since in that case they did not rely on the fact or on any distinction between their rights and those of persons generally interested. That distinction was however relied on and considered in *Budree Das Muhin v. Chooni Lal Johurry*. ⁴ and I would respectfully follow the elaborate judgment of Woodroffe, J. therein, as it is, except on one point, a complete statement of the law on the question before us. He held no doubt that S. 539 was not mandatory; but that is now immaterial, as the enactment of sub-S. (2) has made it clear that Sub-S. (1) is so within its scope. Dealing however with its scope, he also held on full consideration of all the authorities, (and it has not been shown that any direct dissent from his conclusions has since been expressed) that the suit contemplated in it is representative, two persons being enabled by it to sue on behalf of the public and sanction being required as a precaution against wasteful litigation; he distinguished between the right of the public "to see that their alleged appointees have the management of the trust" (that being the point before him) and that of the plaintiffs "considered not as members of the public, but as trustees suing to enforce their own personal rights of management"; and he made use of this distinction to hold that no question whether the section was mandatory really arose, because the suit before him, being by trustees, was not of the description referred to in it.

This question is next whether this authority has been deprived of effect by the enactment in 1908 of sub-S. (2). The

1. (1916) 31 M. L. J. 280.
3. I. L. B. 14 Mad. 186;

2. I. L. R. 16 Bom. 626.
4. I. L. R. 33 Cal. 780.

contrary has been held in the two suits by trustees against trespassers, claiming the trusteeship, *Ayatunnessa Bibi v. Kulper Khalifa*.¹ and *Muhammad Abdul Majid Khan v. Ahmad Said Khan*² the distinction drawn by Woodroffe, J. being expressly relied on in the latter. It was also approved lately in this court, the parties, all being trustees, by Wallis, C. J. and myself in A. S. No. 368 of 1919, (unreported), that decision having been followed by Napier and Odgers, J. in *Venku Chettiar v. Doraisami Chettiar*³ and a similar view would appear to have been taken, although without specific reference to *Budree Das v. Chooni Lal Johurry*⁴, in *Ali Hussain v. Mahomed Husain*⁵. And these authorities moreover commend themselves, when regard is had, as the ordinary rules of construction require, to the amended provision as a whole and the effect of the amendment. The argument of 1st defendant involves that the intention in enacting sub-section (2) was to make clear, not only the mandatory character of S. 539, but also, what (so far as we have been shown) had not been the subject of any marked conflict of decisions, the class of suits to which that section applied and contrary to the ordinary interpretation of the expression "persons interested" and the clearly representative character of the procedure, to bring under it trustees as well as beneficiaries. This cannot be accepted. If the intention had been thus to abrogate the distinction between suits by these two classes, it is not to be supposed that it would have been effected by mere implication without the adoption of different wording in sub-S. (1) and clearer wording of the new sub-S. (2). The reference to reliefs in the latter cannot without undue violence be read as to reliefs in all suits relating to public trusts, by whomsoever instituted and whether they are or are not suits of the kind dealt with in the main provision, sub-S. (1), "suits by persons interested" and of similar nature to the others provided for under the same C. heading in S. 91. It may be that, as observed by Wallis, C. J. and myself in the unreported case above referred to and by the Bombay High Court in *Nilkanth v. Ramakrishna*,⁶ the reliefs claimed by a trustee will in some instances be indis-

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1. (1914) I. L. R. 41 Cal. 749.

2. (1913) I. L. R. 35 All. 459.

3. (1921) M. W. N. 439.

4. I. L. R. 33 Cal. 789.

5. (1919) 52 F. C. 628.

6. I. L. R. 23 B. 876.

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tinguishable from those, which can be claimed on behalf of the public. But it does not follow that the Legislature intended, what is not distinctly expressed, that they should be claimed only subject to safeguards for the representative and responsible character of the proceedings, which would not be appropriate or necessary, when a trustee is the plaintiff.

For the foregoing reasons I would answer the question referred in the negative.

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Kumaraswami Sastri J :—I am of opinion that the question referred to us should be answered in the negative. The suit is by certain hereditary trustees against their hereditary co-trustees claiming various reliefs. The relief which is relevant to the question to be decided is the prayer that a decree be passed directing the defendants "to render account of the profits of the temple lands and topes in their possession and to make over the amounts due from them for the use of the temple."

S. 92 of the Code of Civil Procedure, 1908' re-enacts S. 539 of the Code of 1882 with certain modifications the most important of which is sub-S. 2 which declares that "Save as provided by the Religious Endowments Act 1863 no suit claiming any of the reliefs specified in sub-S. 1 shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that sub-section. The main contention of Mr. Lakshmananna is that in dealing with the scope of S. 92 the question is not who are the plaintiffs or what is the relation between the plaintiffs and the defendants *inter se* but what is the nature of the relief sought, and that if the suit relates to a public charitable trust and the reliefs or any of them fall within the class enumerated in clauses (a) to (h) of sub-section (1) no suit can be brought except by the Advocate-General or by two or more persons with his consent even though the dispute be between the co-trustees *inter se* and relate to matters of internal management and control. I am unable to agree with this contention. The history of the legislation on this subject and the evils which the legislature wanted to remedy show that S. 92 was only intended to govern suits by the public or by the Advocate-General for the vindication of the rights of the public

in charitable trusts. I agree with the view taken by Woodroffe J. in *Budree Das Mukim v. Chooni Lall Johurry*,¹ that S. 539 only governs representative suits brought for the benefit of the public to enforce a public right in respect of an express or constructive trust and does not apply to suits brought by persons to remedy a particular infringement of their own individual right. The object of clause 2 was to set at rest the conflict of decisions as to whether the provisions of S. 539 of the old code were mandatory or merely permissive and enabling and to this extent the decision of Woodroffe J. is affected by the enactment of S. 92. I do not think it was intended to enlarge the scope of the section by taking away private rights of action. In *Ayatunnessa Bibi v. Kulper Khalifa*² and *Mahammad Abdul Majid Khan v. Ahmad Said Khan*³, which were decided after the passing of the Code of 1908 the view of Woodroffe J. was followed with approval. When a trustee has against his co-trustees rights which are personal and quite distinct from the rights of the general public to require that public charities are properly performed it is difficult to see why the sanction of the Advocate-General or the joinder of another person who has no interest in the quarrel between the trustees should be necessary. In the case of hereditary trustees there is the additional consideration that the refusal of the Advocate General to give leave or of a stranger to join in the suit would mean the practical denial of his hereditary rights as against his co-trustees. If the language of S. 92 were plain and clearly involved such consequences Courts will have no option but to apply the section but I am of opinion that there is nothing in S. 92 which compels us to adopt a construction leading to such results. I think two conditions have to be satisfied. The suit should be one for the vindication of the rights of the general public in the charitable trust and the relief should be all or any of the reliefs enumerated in clauses (a) to (h) of sub-S. 1.

There is a conflict of authority in this Court as regards the point now under reference. In *Venkatarangam Chetti v. Venkatasubbammah*⁴ the question arose whether S. 92 Civil Procedure Code, applied to a suit by reversioners who sued for a declaration that the widow has forfeited her right to the office of trustee to a charitable endowment by reason of her

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having alienated the office, for possession of the trust properties and if necessary for the removal of the widow from the office of trustee. Wallis J. was of opinion that S. 92 had no application to such a suit. After referring to that section he observed "even so the scope of the section is to protect the rights of the public, and it is not aimed at the infringement of individual rights, and should not, if possible, be so construed as to deprive individuals whose rights have been infringed of their remedy. In Woodroffe and Ameer Ali's edition of the Code, p. 350 (First Edition) the learned authors discuss the question and appear to be of opinion that such a case does not come within it and that, if a general administration of the trust which has included the removal of the trustee is necessary to provide an efficient remedy for the infringement of the individual right in question such general administration may be granted without regard to the provisions of the section".

On appeal Abdur Rahim, Officiating Chief Justice and Seshagiri Aiyar J. reversed the decision (*Venkatasubbamma v. Venkatarangam Chetti* ¹). Abdur Rahim, Officiating Chief Justice, in dealing with the contention that the suit was mainly one for the assertion of a private right and therefore did not fall under S. 92 was of opinion that "once there has been a breach of trust the right of the public to see that the trust is properly administered arises and that the policy of the legislature, as it is to be gathered from the wording of S. 92 is that in such a case the suit has to be instituted under certain conditions." The hardship to the reversioners was in the opinion of the learned Judge not sufficient to outweigh the fact that in the opinion of the legislature suits instituted in respect of breaches of trust should be only in conformity with the requirements of S. 92. Seshagiri Aiyar J was of opinion that when a suit embraces any of the reliefs specified in clause 1 the effect of clause 2 was to bar any suit not brought in accordance with the section. In *Subramania Pillai v. Krishnaswami Somayajiar* ², it was held by Abdur Rahim and Spencer JJ. that suits by trustees for a declaration that the appointment of a co-trustee by the Devasthanam Committee was invalid fell within the scope of S. 92. Abdur Rahim J was of opinion that the suit was in effect one in which the direction of the Court was necessary for the

1, (1916) 31 M. L. J. 280.

2, (1918) 1 L. R. 42 M. 668.

administration of a public trust within the meaning of the section and fell within clause (h) as it was "a relief cognate to removing a trustee." Spencer J. held that the suit was one to remove a trustee duly appointed by a body who were competent to make the appointment and distinguished *Singara Chariar v. Krishnaswami Iyengar* ¹, and the other cases cited as having been decided prior to the addition of clause (a) of sub-section (1) and sub-section (2.) In Second Appeal 1935 of 1914 Sadasiva Aiyar and Napier, JJ. on a bare reference to the provisions of S. 92 were of opinion that a suit for an account by a trustee against his co-trustees fell within the scope of S. 92 and could only be brought in conformity with clause (1). A contrary view was taken by Wallis C.J. and Oldfield J. in Appeal 368 of 1919 (*Ulagappa Chetti v. Ramanaatha Chetti* where hereditary trustees sued their co-trustees to recover immovable properties and the sums that on taking an account may be due by defendants. Wallis C. J. observed. "The question is not altogether free from difficulty but I think the correct principle is that this S. 92 governs suits for the vindication of the rights of the public in public charitable trusts and has no application to suits for the vindication of the right of management by hereditary trustees or to disputes between such trustees *inter se* as to their turns of management". In *Veuku Chettier v. Doraisami Chettiar* ² Napier and Odgers, JJ. held that a suit by a trustee against a person whom he alleges to have been dismissed for recovery of trust property and for an account was not governed by section 92. The learned Judges followed Appeal 368 of 1919 above referred to on the view of Woodroffe J in *Budree Das Mukin v. Chonni tal Johurry* ³.

Strong reliance was placed by the appellant's vakil on *Saminathan Pillai v. Sunderasa Pillai* ⁴ where it was held that a suit by a trustee of a temple against the trustee of a kattalai established in connection with the temple for an account was held to fall within the provisions of S. 92. In that case certain properties were left to the defendant under his father's will upon thrust to apply the income for the *veivethiam* in the temple of which the plaintiff was the trustee. Wallis C. J. observed that "where there are several trustees of different properties

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1. (1909) 19 M. L. J. 513.

2. (1921) M. W. N. 439.

3. I. L. R. 33 Cal. 789.

4. () 29 M. L. T. 267.

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vested in them respectively for the performance of various services in the temple I do not think the main or general trustee has any right to sue otherwise than under S. 92 of the Civil Procedure Code for the failure of one of the trustees to perform his trust. If he had such a separate cause of action, I should not be disposed to construe S. 92 of the Civil Procedure Code as taking it away from him but I am not satisfied that he has any such right of action under the general law." Krishnan J was of opinion that the suit as framed did not fall within S. 92. Owing to this difference of opinion the case came on before a bench of three Judges of which I was a member. I took the view that there was no contract between the plaintiff and defendant. The statement of the law by the Chief Justice as to independent trusts with different trustees though for the benefit of the same beneficiary was in my opinion correct, and the only question was whether the suit was governed by section 92. This case is therefore clearly distinguishable from the present one which is one between co-trustees. Reliance was placed by the appellant's vakil on the decision of Parson J in *Tricumdas Mulji v. Khimji Vullabhdas*¹ where the learned Judge was of opinion that the provisions of section 539 of the Civil Procedure Code of 1882 were mandatory and that a suit by two trustees against two other trustees for their removal and for an account was governed by the section the claim for an account falling within the words "decree granting such further or other relief as the nature of the case may require". This case so far as I am aware has not been followed and a contrary view was taken in *Miya Vali Ulla v. Syed Bava Santi Miya*,² where Farran C. J. and Hoskin J. held that a suit by a co-trustee for an account and recovery of his share did not fall within section 539 as the plaintiff's complaint merely was "that he, claiming to be a co-trustee, has been excluded from a share in the management and in the profits of such management". In *Nilakanth v. Ramakrishna*,³ it was held that a suit for a declaration that the defendants were not properly appointed trustees of a temple and for an injunction did not fall under section 92 Civil Procedure Code. The learned judges dissented from

1. I. L. R. 16 Bom., 626.

2. I. L. R. 22 Bom., 496.

3. (1921) 23 Bom. L. R. 1876.

*Subramania v. Krishnaswami Somayajiar.*² Macleod C. J. observed "I do not think that merely because the suit concerns the question of the validity of the appointment of defendants 1 to 4 as trustees of the temple and because it might on that account be considered that the suit is somewhat akin to suits which came within the provisions of section 92 that, therefore, we are to hold that the suit in the language of English lawyers is a suit that comes within the equity of the statute."

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Co-trustees are co-owners of trust properties and are in law entitled to be in joint possession of all trust properties whether it be in the form of immoveables, moveables or cash. It would ordinarily render a trustee personally liable if he allowed the cash or movables to be in the exclusive possession and management of a co-trustee and there was misappropriation. He is in law entitled to be in joint possession of the funds even when the other trustee is carrying out the trust properly. Where moneys are in a co-trustee's hands an account would be necessary to ascertain his liability and the claim would in a sense be a suit for an account of trust moneys. I find it difficult to see why if a suit by a trustee against his co-trustees or strangers for joint or exclusive possession of immovable or moveable properties does not require sanction of the Advocate-General of the joinder of another person the mere fact that money is claimed to ascertain which an account will have to be taken should fall under section 92. I think the words "directing accounts and enquiries" in clause 1 (d) of S. 92 should be confined to suits by the Advocate-General or by two or more persons with his consent against all the trustees for an account of their management and not to one or more trustees against the others as each trustee has a right to call upon the other to account to him for trust funds he has received even though the other trustee commits no breach of trust.

I am of opinion that the decision of Woodroffe J in *Burdee Das Muhim v. Choonilal Johurry*² though under the old Code of Civil Procedure of 1882 is equally applicable to suit under S. 92 of the Code of Civil Procedure of 1882 is equally applicable to suit under S. 92 of the Code, 1908 and that the addition of clause has not the effect taking away private right of suit which

1. 38. (1918) I. L. R. 42 Mad 668.

2. I. L. R. 33 Cal. 789.

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trustees may have against each other or strangers. I would follow the view taken by Wallis J. in *Venkataram Chetti v. Venkatasubbamma*¹ and by the Chief Justice and Oldfield J. in Appeal No. 368 of 1919 (in *Ulagappa Chetti v. Ramanatha Chetty*).

Ramesam J. I agree.

Odgers J. :—I agree that we should answer the reference in the negative.

A. S. V.

Answer in negative.

PRIVY COUNCIL.

PRESENT :—VISCOUNT CAVE, LORD SHAW AND MR. AMEER ALI.

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v.

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... *Respondent.*

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Madras Regulation XXV of 1802—Ss. 3 and 4—Applicability and effect—Zemindar—Permanent Settlement—Sanad—Construction—Inam lands within Zemindary—Resumption—Right of Government—Sanad granted and assessment fixed upon quite a different basis from that provided in S. 4 of Reg. 25 of 1802—Effect—Madras Regulation XXXI of 1802—Applicability—Land not exempt from payment of public revenue.

Pursuant to an arrangement come to between the British Government and the then holder of the Zemindary of Venkatagiri, held subject to the payment of a fixed revenue or peshcush and to the burden of military service, a Sunnud-i-milkhat, istimrar was issued to the Zemindar on August 24, 1802, (but made to take effect from July 12 of that year, i.e. from before the date on which Regulation XXV of 1802 was passed. The sunnud provided that, in consideration of the British Government relieving the Zemindar from the burden of military service and itself undertaking the same, "the British Government has fixed your annual contribution, including equivalent for the military service and the established peshcush for every year, at the sum of star pagodas 1,11,068, which said amount shall never be liable to changes under any circumstances, and is here by accordingly declared to be the permanent annual demand of Government on your Zemindary."

The Sannad also stated in specific terms the extent of the Zemindary. Clause 6 of the Sannad contained certain reservations of the absolute abandonment on the part of Government of all claim to enhance the consolidated peshcush, but they were not in reference to lakhiraj lands within the Zemindary. All those lands had been taken into consideration in arriving at the estimate of the commuted amount, but the Sanad contained no reference whatever to them. The other documents connected with the matter showed that the Government, represented by the Governor-in-council, on the one side, fixed a definite specific assessment on the whole Zemindary irrespective of particular assets derived from each particular unit of property within the estate, and that the Zemindar, on the other side, accepted that arrangement on that special understanding.

On an attempt made by Government to enforce its rights against the Zemindar in respect of the lakhiraj lands within the Zemindary, the question

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1. (1913) 25 M. L. J. 373.

arose whether the Zemindar was entitled to take possession of them without any liability for the payment of additional revenue or whether the Government was entitled to the benefit of the resumption and possessed the right to assess revenue on those lands. The claim of Government was based on the grounds that under S. 4 of Madras Regulation XXV of 1802 Government had reserved its power to resume and assess lakhiraj lands, that the Sanad granted to the Zemindar could not possibly override the express provisions of the Regulation and that the executive government had no power to convey to the grantee—namely, the Zemindar—larger rights than the statute provided.

Held, that, as the Sannad to the Zemindar contained no reference to the Lakhiraj lands within his Zemindary, the provisions of S. 4 of Madras Regulation 25 of 1802 had no application in the case of his property and that the assessment fixed upon it by virtue of the arrangements adopted in 1802 was upon a basis quite different from that provided in S. 4 of the Regulation. In other words, both the assessment and the sannad are outside the Regulation under which the Government claims the right to resume the inam lands within the estate of the plaintiff and to assess them separately.

S. 3 of Madras Regulation XXV of 1802 lays down a definite rule relative to the principles on which the provisions in the Regulation should be construed.

Madras Regulation XXXI of 1802 refers entirely to procedure appointed for the investigation of the title to hold lands exempted from the payment of a revenue. Here the lands which are sought to be resumed were not exempted from the payment of public revenue, the revenue which was paid on the estate included the lands in question and the jama was assessed on the whole estate inclusive of the Lakhiraj and inam lands.

Consolidated Appeals (No. 10 of 1920) from a judgment and four decrees of the High Court (*Sir John Wallis, C. J.* and *Phillips J.*) (March 29, 1916) affirming four decrees of the District Court of Nellore.

[For a full report of the High Court Judgment See 31 M. L. J. 97.]

Dunne K. C. and *Kenworthy Brown* for the appellant.

Upjohn K. C. and *B. Dube* for the Respondent

The Judgment of their Lordships was delivered (July, 15th 1921) by

Mr. Ameer Ali. The facts of this litigation take their origin in the early establishment of British rule in the Madras Presidency. The Raja of Venkatagiri holds a Zemindari of considerable extent in the modern district of Nellore. His ancestors were admittedly in possession of the estate since the Mohammadan times, subject first to the Emperors of Delhi and afterwards, on the disruption of the Mogul Empire, to his representatives in the Carnatic, usually styled the Nawabs of Arcot. Besides the payment of a fixed revenue or peshcush.

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they were bound to maintain an armed force for the assistance of Government in times of disorder or rebellion.

In the year 1792 a treaty was entered into between the East India Company on the one side, and the Nawab of Arcot on the other, under which the administration of the country was assigned to the British. The arrangement, however, was found not to be satisfactory. It had left the Nawab a considerable amount of authority, which soon gave rise to causes of friction between him and the East India Company. Consequently, in 1801 a fresh treaty was executed under which the entire administration passed into British hands. In both the treaties the position of the Raja of Venkatagiri was maintained; and the revenue he became bound to pay to the East India Company continued to be the same as he had all along paid to the Mohammedan rulers.

In pursuance of the policy laid down by the Board of Directors, Lord Clive, who was at the time the Governor of Madras, proceeded to persuade the Raja of Venkatagiri and other poligars, who occupied a similar position, and whose zamindaries lay chiefly in Western Arcot, to abandon the system of maintaining an armed force for the assistance of Government. It was pointed out to them by the Governor in Council that the duty of maintaining an army for the service of Government imposed a heavy and costly responsibility; the East India Company would henceforward take over all charge for the preservation of law and order and thus relieve the zemindars of an irksome burden. They were at the same time assured that their fixed peshcush would remain invariable. The zamindars were thus induced to consent willingly to this arrangement, and in lieu of maintaining an army, which costs them a considerable amount of money, they undertook to pay an additional revenue on their estates, which was added to their peshcush.

Pursuant to this arrangement a sanad was issued, on August 24, 1802, to the Zemindar of Venkatagiri and other zemindars occupying a like position, embodying the terms which had been agreed upon. This document is called a "Sunnud-i-milkiat Is timrar, or deed of permanent property." The word "istimrar" denotes its character of perpetuity and permanency of revenue. The aggregate peshcush was, in the case of Venkatagiri, put down as 1,11,058 star pagodas.

The clause in the sanad which relates to this particular arrangement is in these terms : "In consideration of your relief which your finances will derive from the relinquishment of your military service and from the discontinuance of the expenses to which you have on that account been liable, in consideration also of charging itself with the entire protection of the territories dependent on its power, the British Government has fixed your annual contribution, including equivalent for the military service and the established peshcush for every year, at the sum of star pagodas 1,11,058, which said amount shall never be liable to changes under any circumstances, and is hereby accordingly declared to be permanent annual demand of Government on your zamindari."

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The only reservations in respect of the absolute abandonment on the part of Government of all claim to enhance the consolidated peshcush is contained in clause 5, which runs thus : "The permanent peshcush fixed by this sanad in your zamindari is exclusive of the revenue derived from the manufacture and sale of salt and satpetre, exclusive of the sayer or duties of every description, the entire administration of which the Government reserves to itself, exclusive of the tax on the sale of spirituous liquors and the intoxicating drugs, exclusive of all lands and rums heretofore appropriated to the support of the police establishment. The Government reserves to itself the entire exercise of its discretion in continuing or discontinuing temporarily or permanently. The articles of all sorts included according to the custom and practice of the country under the several heads above stated".

It is clear, however, that at this time two policies were on foot : one with regard to the powerful zamindars who maintained large armies, with whom a settlement was essential on a separate basis ; the other a measure of general assessment in accordance with the instructions issued to the Board of Revenue on September 24, 1799. In the carrying out of this latter policy the Government passed Reg. XXV. of 1802, which came into force on July 13, 1802. The preamble of this Regulation is important. It declared : "Whereas it is known to the zemindars, merassydars, ryots, and cultivators of land in the territories subject to the government of Fort St. George, that from the earliest until the present period of time, the public assessment of the land revenue has never been fixed ; but that,

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according to the practice of Asiatic Governments, the assessment of the land revenue has fluctuated without any fixed principles for the determination of the amount ; and without any security to the Zemindars, or other persons, for the continuance of a moderate land tax ; that on the contrary, frequent enquiries have been instituted by the ruling power, whether Hindu or Mohammedan, for the purpose of augmenting the assessment of the land revenue ; that it has been customary to regulate such augmentations by the enquiries and opinions of the local officers appointed by the ruling power for the time being ; and that in the attainment of an increased revenue on such foundations it has been usual for the Government to deprive the zamindars, and to appoint persons on its own behalf to the management of the zemindaries ; thereby reserving to the ruling power the implied right, and the actual exercise of the proprietary possession of all lands whatever ; And whereas it is obvious to the said zemindars, merassydars, ryots, and cultivators of land that such a mode of administration must be injurious to the permanent prosperity of the country, by obstructing the progress of agriculture, population and wealth and destructive of the comfort of individual persons, by diminishing the security of personal freedom, and of private property : Wherefore the British Government, impressed with a deep sense of the injuries arising to the State, and to its subjects, from the operation of such principles, has resolved to remove from its administration so fruitful a source of uncertainty and disquietude ; to grant to zamindars, and other landholders, their heirs and successors, a permanent property in their land in all time to come and to fix for ever a moderate assessment of public revenue on such lands, the amount of which shall never be liable to be increased under any circumstances.

In S. 2 it proceeded to enact that . "In conformity to these principles, an assessment shall be fixed on all lands liable to pay revenue to the Government : and in consequence of such assessment, the proprietary right of the soil shall become vested in zamindars, or other proprietors of land and in their heirs and lawful successors for ever."

Sect. 3 will be referred to later.

Sect. 4, which forms an important element in the consideration of the present case, is in the following terms : "The Government having reserved to itself the entire exercise of its

discretion in continuing or abolishing, temporarily or permanently, the articles of revenue included according to the custom and practice of the country, under the several heads of salt and saltpetre, of the sayer, or duties by sea or land ; of the abkary, or tax in the sale of spirituous liquors, and intoxicating drugs ; of the exercise on articles of consumption ; of all taxes personal and professional as well as those derived from markets fairs or bazaars ; of lakhiraj lands (or lands exempt from the payment of public revenue) ; and of all other lands paying only favourable quit rents : the permanent assessment of the the land tax shall be made exclusively of the said articles now recited."

The drafting of this section can by no means be commended for preciseness or lucidity, but it is clear that the reservations in respect of the power of Government are wider than in the sanads referred to above.

It appears that the Venkatagiri estate, when it came under British administration, included a large number of inam lands, which had been expropriated by the zamindars from time to time for charitable or pious purposes, either free of rent or on favourable rent. Some lands had also been granted to the people for services to the estate. In respect of the latter the zamindar had an absolute right of resumption. As regards the others, which came within the category of pious grants his power appears to have been limited; he could resume them only on specific and apparently valid reason.

In 1816 the Government attempted to enforce its rights against the zamindar in respect of some of these alienated lands. The dispute was as to whether the zamindar was entitled to take possession of them without any liability for the payment of additional revenue, or whether the Government was entitled to the benefit of the resumption and possessed the right to assess revenue on those lands. The dispute was decided in favour of the zamindar namely, that the Government had no such right as it claimed. Matters remained quiescent from the year 1822, when the action was decided in the Provincial Court, until 1897, when the Government again put forward the same claim as they had done in 1816 and attempted, by their revenue officers, to investigate into the title of the grantees who held the lands under the zamindar and to ascertain whe-

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then the grants were valid or not, and if they were not, to assess revenue on them. The Raja of Venkatagiri resisted the Government's claim, and after a good deal of correspondence brought in the Court of the District Judge of Nellore the four suits which form the principal foundation of the present consolidated appeal. The fifth suit, which has been made a part of the proceedings, was brought against the Government on similar grounds by another person in the Court of the Subordinate Judge of North Arcot in respect of lands lying in another estate.

In para. 10 of the plaint the Raja states the nature of the grants and his rights with reference to the alienated lands, and in para. 11 he specifies his grounds of objection to the fresh assessment which the Government proposed to make on him. His ground of action is thus stated in the plaint: "That the Inam Deputy Collector of Nellore acting under the orders of Government, gave a notice to the plaintiff that he would proceed to investigate the condition of devadayam and dharma-dayam inams in the Venkatagiri Zamindari which had been granted prior to the permanent settlement, and that in order to enable him to do so, the plaintiff should furnish him with a list of such inams containing the particulars specified in a statement annexed to the said notice, and that, in spite of the plaintiff's repeated objections to the right of Government to resume such inams in the Zemindari of Venkatagiri or deal with the same under the inam rules, the said Deputy Collector is proceeding with the investigation.

He pleaded res-judicata on the basis of the proceedings in 1816, and alleged further that the Government by their own conduct were estopped from claiming the right of assessment. On these grounds, he prayed for a declaration that the Secretary of State had no right to resume or assess to public revenue inams or lakhiraj lands situate within the zemindari of Venkatagiri or any reversionary right therein, or any such right in the inams or lakhiraj lands which had already come in the plaintiff's possession. He also asked for a permanent injunction restraining the Secretary of State and his officers from holding any investigation into the nature of and title to inams or lakhiraj lands within his estate, and from dealing with the same under the Inam Rules sanctioned by Government on August 9 1859, or resuming them or assessing them to public revenue.

The Government joined issue with him on the question of the right of Government to resume and assess these expropriated lands; their principal contention being that under S. 4 of Mad. Reg. XXV of 1802 the Government had expressly reserved its power and that the provisions in the sanad do not prejudice it or take it away.

The other objections in the written statement do not appear to their Lordships material for the purposes of the present judgment.

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The District Judge states, in their Lordships' opinion, correctly and consisely the question for determination. The main question really to be decided in this suit is, whether the reversion in respect of inams or lakhiraj lands situated within the zemindari of Venkatagiri belongs to the Government or to the zemindar, and whether the Government is entitled to resume those inams or whether such right of resumption belongs to the zemindar." In a careful review of the facts, he held in substance that the Venkatagiri zemindari did not fall within the purview of the Regulation, and that consequently the contention of the Government was not maintainable; and he accordingly in the four suits before him made a declaration in favour of the plaintiff's right and granted an injunction as asked for. On appeal to the High Court his decrees have been maintained, although the reasons which the learned Judges of the High Court have assigned for coming to the same conclusion as the first Court do not proceed on the same lines as those followed by the District Judge. In substance, however, there is absolute concurrence between the two Courts.

The Government appears to have failed also in the Court of the Subordinate Judge of North Arcot and their appeal to the High Court was dismissed.

As their Lordships substantially agree with the conclusions arrived at by the Courts in India, they do not think it necessary to traverse at any great length the grounds upon which the High Court and the District Judge have rested their judgments. It has been argued before the Board that the sanad of the plaintiff could not possibly override the express provisions of the Regulation, and that the executive Government had no power to convey to the grantee, namely, the zamindar larger rights than the statute provided. It was urged that the rights of the Crown cannot be taken away by implication, and it was stated that

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having regard to the terms of the section already referred to, the Government had absolute power at any time to direct an investigation into the title of the lakhiraj lands to which the plaintiff laid a claim as part and parcel of his estate not liable to assessment by Government. In view of this contention which has been strenuously pressed by learned counsel for the Government, it becomes necessary to examine a little more closely the circumstances which led to the conferment of the sanad on the Zamindar of Venkatagiri and the other zamindars who were in the same position with him, and to consider how far the grant is affected by the provisions of Mad. Reg. XXV. of 1802.

As already observed, the British authorities appear to have taken in hand as early as September 24, 1799, the regularisation of the land revenue in the Carnatics and to have issued instructions to the Board of Revenue as to the line of action to be taken, for the purpose of instituting a general inquiry into the condition under which land was held within those territories. Reg. XXV of 1802 was an outcome of the inquiries made under those instructions to the Board of Revenue; but it appears that whilst these inquiries were proceeding with regard to a general settlement of revenue, simultaneously an inquiry was in progress respecting the amount the Venkatagiri estate should in addition to the "established peshcush" pay in lieu of its release from the liability to keep up an army for the service of Government.

Mr. Stratton, the peshcush Collector of North Arcot, had been deputed to make a thorough inquiry as to the resources of the different polygars, and the report which he submitted to the Government on July 14, 1801, contained all the requisite information, and upon that information the commutation which was granted to the zamindar of Venkatagiri in respect of his military force appears to have been fixed. He sets out in his report the different kinds of inams, some of which the zamindar was at liberty to resume at his own discretion, others which he could not resume without sufficient reason, such as neglect of duty etc. All these lands appear to have been taken into consideration in arriving at the estimate of the commuted amount.

The sanad to the zamindar of Venkatagiri was issued, as already stated, on August 24, 1802, by the Governor in Council,

Lord Clive, on behalf of the East India Company. The material terms of the sanad have already been referred to.

On the same date Lord Clive addressed a letter to the zamindar in terms which leave little doubt as to the meaning to be attached to the grant. He states first the object with which the sanad was granted, and goes on to say that "Under the circumstances, the amount which your brave self has to pay annually in future is fixed as follows. In consideration of military service eighty-nine thousand three hundred and eighty five star pagodas. The fixed peshcush (tribute) twenty-one thousand six hundred and seventy-three pagodas. Total one lakh eleven thousand and fifty-eight star pagodas." And what follows is important. The document goes on to say: "As the above-mentioned amount is the maximum portion of your exalted self's zamindari which should annually be sent to the Government on account of the expenses for general protection, therefore, sanad (deed) of perpetual ownership, to the effect that the sum of one lakh eleven thousand and fifty-eight star pagodas should be paid to Government annually, by the zamindari of your brave self, by way of permanent jama (assessed revenue), is sent to you under the seal and signature of the members of Government." And again: "Accordingly" having this matter in view, all the incomes from the lands of Amaram and Kattubadi retained in possession of foot soldiers were not included in the account of the item of the consideration for their services."

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On August 25, 1802, a letter was addressed by the Secretary to the Government to the Collector of Western Peshcush, which included the three zamindaries principally concerned, namely, Venkatagiri, Calastry and Bomrauzepollam making it clear that the revenues that were assessed upon these three zamindaries were deliberately fixed in the case of Vankatagiri at Rs. 1,11,058, to be paid annually by the zamindar. Para. 10 of that document is important, and it is in these terms: "To remove from the minds of the zamindars all doubt of the permanency of the present arrangement the Governor-in-Council has caused sunnud-i-milkiat istimrar to be prepared under the seal and signature of His Lordship-in-Council for the purpose of being delivered to the zamindars. Kabooliats corresponding with these sanads are also transmitted, and the special commission desire that you will require the zamindars to sign and return them to

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you duly executed ; to these kabooliats you will annex a kist-bundy fixing the kists according to the seasons of produce."

In accordance with these instructions from the Government given to the Collector of Western Peshcush, kabooliats were taken from the zamindar in identical terms, but before executing his kabuliyat the zamindar of Venkatagiri took particular care to have the extent of his zamindari inserted in specific terms in the sanad that was granted. That appears from Mr. Stratton's letter of September 17, 1802. In para. 6 that officer states as follows : "The Vankatagiri zamindar further made objections to sign his kabooliat until I had specified therein the several districts composing the Venkatagiri zamindari ; considering this scruple of no material import I was induced to accede to his request and at his suggestion to recommend to you that the districts under him, should be particularised at the back of his sanad, for which purpose it is now accordingly returned."

So far as these documents are concerned, they leave no possible doubt that the Government, represented by the Governor-in-Council on the one side, fixed a definite specific assessment on the whole zamindari of Venkatagiri irrespective of the particular assets derived from each particular unit of property within the estate, and that the zamindar, on his side, accepted that arrangement on that special understanding. The question now is whether that action of the Government was, in view of the provisions of Mad. Reg. XXV. of 1802, valid or otherwise. As already stated, counsel for the appellant have strongly argued that in view of the provisions of S. 4 of that Regulation excluding the "lakhiraj lands (or lands exempt from the payment of the public revenue) and all other lands paying only favourable quit rents" from the permanent assessment of the land tax, it was not competent to the Governor-in-Council to grant a sanad of the character that is in issue in this case; and much stress is laid upon the instructions that were originally issued in connection with the inquiry into the general resources of the different estates in 1799. It is said that in that document the Government took care to reserve its right on all lands "at present alienated and paying no public revenue which may have been or may be proved to be held under illegal or invalid titles and the revenue of which is not included in the Committee's account."

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In respect of this contention two considerations arise—firstly, whether the lands which are now sought to be assessed were in fact paying no public revenue, and secondly, whether in view of the provisions of S. 3, it is open to the Government to contend that the sanad should not be taken into account in the construction of S. 4. Sect. 3 declares as follows: "Where the conditions of the permanent assessment of the revenue may have been adjusted a sanad-i-milkiyat-i-istimrar, or deed of permanent property, shall be granted on the part of the British Government to all persons being or constituted to be zamindars or proprietors of lands, and each zamindar or proprietor of land shall execute and deliver to the Collector of the district a correspondent kabuliyat. The said sanads and kabuliyats shall contain the conditions and articles of tenure by which the lands shall be held; in all cases of disputed assessment, reference shall be had to the sanads and kabuliyats; and judgment shall be given by the Courts of Judicature, in conformity to the conditions under which the agreement may have been formed in each particular case."

The above section lays down a definite rule relative to the principles on which the provisions in the Regulation should be construed. Now the sanad in question contains no reference to the lakhiraj lands within the Venkatagiri zamindari. It would follow, therefore, that in the case of his property the provisions of S. 4 have no application, and that the assessment fixed upon it by virtue of the arrangements adopted in 1802 was upon a basis quite different from that provided in S. 4 of the Regulation. In other words, both the assessment and the sanad are outside the Regulation under which the Government claims the right to resume the inam lands within the estate of the plaintiff and to assess them separately.

It should also be observed that, although the Regulation was passed on July 13, 1802, and the sanad was granted to the zamindar of Venkatagiri on August 24, the recommendation of the Commission of August 12, 1802, on which the sanad was granted, recommended that the new assessment should be fixed to run from July 12 of that year. After stating the principle on which they were proceeding in fixing the amount to be paid by the zamindar in commutation of the military service, in para 40 they say as follows: "If the grounds on which we have now had the honour to propose that the assessment of public

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revenue should be fixed on the four Western zamindaries including the customary peshcush and equivalent for military service, be approved by your Lordship-in-Council, the total amount of revenue derived to the State from those valuable provinces will exceed the amount of the old peshcush by the sum of 1,72,296 pagodas, and the aggregate amount of peshcush and the equivalent will, in future, be 2,50,000 pagodas per annum. We conclude the subject by recommending that the permanent assessment of the public revenue on these zamindaries be fixed accordingly at that rate, from the 12th day of July last." This also clearly shows that the arrangement in respect of "the four Western zamindaries" was made independently of the provisions of the Regulation. Another thing has to be observed in connection with his arrangement namely, the difference in the terms of this sanad from the sanads granted to the other zamindars under the Regulation itself.

In the view their Lordships take of the general evidence in the case they do not consider it necessary to express any opinion on the question raised by the plaintiff that the controversy in dispute is res judicata in consequence of the decision of the Provincial Court in 1822; but it is desirable to point out that since that decision the Government at various times expressly assented to the position which the zamindar had taken up in respect of the inam lands within his estate. Their Lordships will refer only to three documents: first, Exhibit K, a letter of April 24, 1823, addressed by the Secretary to the Board of Revenue to the Chief Secretary to the Government, in which it was stated as follows: The permanent peshcush of the zamindari of Venkatagiri was fixed upon the principles as upon Bomrauze and Calastry, and for the same reasons which induced the Board to state upon a former occasion that they considered the zamindar of Bomrauze not to be entitled to remission on account of certain villages having been taken from him by a decree of Court inasmuch as by the operation of that decree there was taken from him nothing on which his contribution to Government was fixed; they are now of opinion that the zamindar of Venkatagiri is entitled to benefit by the resumption of any villages formerly alienated from his Zamindari without question on the part of Government

or being liable to assessment on the increase to his resources, thereby acquired.

Again, in 1839 the Board of Revenue, in a letter addressed to the Chief Secretary to the Government (Exhibit N), stated as follows: "The zamindar now rests his claim on the ground that as his permanent cowle was framed without any reference to its assets, and as it contains no reservation in respect to the right of resuming lakhiraj land, as in the case of the northern and other zamindaries, the right to resume inams or lakheraj lands in the position of Peddapaloor belonging of right to him and by no means to the Government, and he cites a decree by the Provincial Court of the Northern Division in favour of the zemindar of Venkatagiri in a suit brought by the Collector of Nellore for the recovery of the village under similar circumstances," and in para 7 they say as follows: "On the other hand the decrees of the Zillah Court of Chittoor and of the Provincial Court of centre division are in favour of the right of Government to resume, in preference to that of the zamindar. But it will be noticed that they contain no allusion to the dissimilarity in the terms of the permanent settlement of Calastry and the other Western polliems. assuming that the peshcush was fixed as on the zamindaries in the northern, upon the assets, and that regulation XXXI. of 1802 applies to the former as to the latter. By a reference to the kabuliyat of the zamindar of Calastry and the correspondence which passed at the time a permanent cowle was granted to him, it will be seen at once that the peshcush was not so fixed, and, as already shown, the Regulation above mentioned was not considered to apply to the case of the Venkatagiri zamindar.

On September. 3, 1860: the Commissioner of the Division issued certain instructions for the guidance of the Deputy Collectors employed in inam investigations of the North Arcot district, and he correctly laid down the position with regard to the Zemindar of Venkatagiri and the other Zemindars who stood in the same position, in the following terms. "The private estates will be first noticed. The Zamindaries of Kalahastri and Karvetinagar were, like the Zamindari of Venkatagiri in the Nellore District, permanently settled in 1803 on the principle of the commutation of the military service tenure attached to them. The peshcush was not fixed upon the assets of the estates, but was a proportion

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of the cost of the Zamindar's military establishment, inclusive of amarams and kattubadis, diminished by the amount of revenue derived from salt, sayer and abkari, which were reserved by Government. The inams were not excluded by the terms of the settlement, and the Government have therefore no right of reversion in them."

The revenue authorities in that part of the Presidency, in the face of the expression of opinion to which reference has been made here, have attempted to reverse the arrangement expressly entered into in 1802. In their Lordships' opinion this attempt fails.

Some stress was laid on behalf of the appellant on the provisions of Mad. Reg. XXXI of 1802. It is sufficient, however, to point out that that Regulation refers entirely to procedure appointed for the investigation of the title to hold lands exempted from the payment of revenue. Here the lands which are sought to be resumed were not exempted from the payment of public revenue, the revenue which was paid on the estate included the lands in question and the jama was assessed on the whole estate inclusive of the lakhiraj and inam lands.

For the foregoing reasons their Lordships are of opinion that the judgments and decrees of the Courts in India are right and should be affirmed and that these appeals should be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitor for appellant: *Solicitor, India office.*

Solicitor for respondent: *Douglas Grant.*

Appeal dismissed.

PRIVY COUNCIL.

PRESENT:—LORD SHAW, LORD PHILLIMORE AND MR. AMEER ALI.

Bipradas Pal Chowdhury (Since deceased) ... *Appellant.*
 v.

Kamini Kumar Lahiri and others. ... *Respondents.*

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Bengal Tenancy Act (VIII of 1883)—Ss 161, 167—Patni Taluk—Rent Sale—Incumbrances—Meaning—Purchaser's to avoid—Onus on plaintiff—Lakhiraj land—Tenants' claim on ground of—Notice to avoid incumbrance—Bar of limitation—Absence of issue in courts below—High Court deciding against plaintiff on probabilities—Propriety.

A purchaser at a rent sale of a Patni Taluq attempted to take possession of a portion of the lands included in it but was resisted by tenants who claimed to

hold them as revenue-free or as lakhiraj. He then served notices under S. 167 of the Bengal Tenancy Act. of 1885 treating the interests which they claimed as incumbrances which he had power under the Act to avoid. They persisted in their claims and the purchaser thereupon instituted a civil suit. The only evidence adduced by him was a series of registers and thake-bust maps and thak statements in none of which the suit lands were shown to be lakhiraj, although there were instances in which other lands were mentioned as being lakhiraj. He did not show that any rent had ever been received in respect of the suit lands. There was, on the other hand, a mass of evidence to show that the defendants and their predecessors had occupied the suit lands revenue free for periods greatly exceeding 12 years. *Held*, that, in the absence of any indication that the suit holdings as revenue free tenures had an origin either by creation or by the sufferance of a patnidar since 1807, the High Court was right in saying that the proper presumption was that they ran back to a period antecedent to the creation of the taluk, or to put it in another way, that it lay upon the plaintiff to show an origin subsequent to the creation of the Patni Taluk if he were seeking to avail himself of S. 167 of the Act, and to annul those interests as incumbrances.

Quære, Whether an interest not directly created by the talukdar, but allowed to grow up by his sufferance and negligence is an incumbrance within the definition given to that word in S. 161 of the Act.

In this case a question arose as to whether the notices under S. 167 of the Act were invalid because they had not been served within one year from the date of the sale or the date on which he first had notice of the incumbrance whichever was the later. The plaintiff did not act within one year from the date of the sale, but alleged that he did act within one year of his having notice. No point to the contrary was made in the courts below the High court, and no issue was taken. Nevertheless *held*, acting upon probabilities, that the plaintiff must have had notice more than a year before he acted. Their Lordships disapproved of this course of action.

On appeal from the High Court at Calcutta.

Consolidated Appeals, one (No. 65 of 1920) from a judgment and eighty-eight decrees (February 12, 1914) of the High Court, reversing decrees (June 2 and 19, 1911) of the District Judge of Nadia on appeal from the Munsif of Krishnagar; the other (No. 12 of 1920) from a judgment and sixty-three decrees (May 29, 1917) of the High Court affirming decrees (August 30, 1915) of the Additional Subordinate Judge of Nadia on appeal from the Munsif of Ranaghat.

De Gruyther K. C. and B, Dube for appellants.

Respondent did not appear.

The Judgment of their Lordships was delivered (14th June, 1921) by.

Lord Phillimore. The plaintiff in the Courts below, now represented by the present appellants, was the purchaser at a public auction of the patni taluk Taraf Santipur, the property having been put up to sale in execution of a decree for rent. When he came to take possession he found that in thirty-eight villages, the tenants, with some small exception, set up a claim

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to hold their lands as revenue free or as lakhiraj. He accordingly served notices under S. 167 of the Bengal Tenancy Act of 1885 upon 103 occupiers, treating the interests which they claimed as incumbrances upon his purchase, which he had power under the various sections of the Act to avoid or annul. As they persisted in their claims he instituted in the Court of the Munsif, 103 suits which were heard together.

During the somewhat protracted litigation which followed, fifteen of these suits were disposed of, and do not now come before their Lordships. The remaining eighty-eight are the subject of the first appeal, and there is a further batch of appeals represented in the second consolidated appeal also before their Lordships. The principles governing all these cases are the same, and the decision in one would cover the rest.

The case made by the plaintiff is that the patni taluk in question was created in 1807, that it was put up for sale on October 2, 1899, and was bought by him free of incumbrances; that the lands in question were not registered as lakhiraj and were in fact mal lands, and that any right of the occupier to hold revenue free must be derived under some grant made by the talukdar, and that this would be an incumbrance upon the taluk which the plaintiff would be entitled to avoid or annul."

The defences in general form were that no zamindar, patnidar or darpatnidar had been in possession of the land within twelve years, and the claims therefore were barred by limitation; that the lands never were mal lands; that they had in fact been registered as lakhiraj; and certain other objections not material to be discussed in the present judgment.

When the case came for trial before the Munsif he decided in favour of the defendants and dismissed the various suits, and on appeal the District Judge confirmed his decision. The matter was then taken to the High Court of Judicature at Fort William in Bengal, which Court remanded the case to the District Judge, for rehearing the parties upon the evidence, and then addressing himself to the determination of the questions of law, intimating that the whole case would be open before him, and that every question of fact and law that arose for consideration upon the issues must be decided.

On this second hearing the District Judge, who was not the same as the first District Judge went very carefully into the evidence, and took the view that the burden of proving that

the lands were mal lands lay upon the plaintiff, but that he had discharged it except in eight suits, in which he held that the defendants had proved that their lands were lakhiraj. The ground on which he rested his view that the onus was in the first instance upon the plaintiff was that these suits were not suits "for the resumption of lakhiraj lands, but for the eviction of the persons holding them, on the ground that they are trespassers, and therefore had not right or title to hold them."

The materials put before him were partly documentary and partly oral. The plaintiff relied upon the pargana register kept under Regulation 8 of 1800, the kanungo register prepared and kept under Regulations 8 of 1816 and 1819, the register kept under the Land Registration Act of 1876, and copies of the thak maps and thak statements. In none of these were the lands in question shown to be lakhiraj, although there were instances in which other lands were mentioned as being lakhiraj. This was all the evidence which he gave. He did not show that any rent had ever been received in respect of the lands in suit. The way in which the learned District Judge accounted for this is as follows: "It must be remembered that the plaintiff is a new comer having purchased the patni at an auction sale only recently, and when it is borne in mind that some of the outgoing patnidars are at the back of the contending defendants, there is nothing extraordinary in the fact that plaintiff could not produce any collection papers to show that any rents have ever been realized from the defendants for the lands in suit. I therefore hold that the plaintiff by producing series of registers and thakbast maps and thak statements, and showing that the lands in suit do not find any entry in any of these documents, as lakhiraj succeeded in discharging the onus upon him, sufficiently to shift it on the defendants to prove that the lands they hold are lakhiraj lands."

The documentary evidence which the defendants relied upon was the quinquennial register, the terji statements and the taidad registers. The learned District Judge thought that no useful assistance could be obtained from the two former; but with regard to the taidad register, he gave it force wherever the lands could be identified. He thought that there was sufficient identification in eight cases and he decided these in favour of the defendants. All the rest he decided in favour of the plaintiff.

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The eighty-eight defendants who had been unsuccessful appealed to the High Court. The High Court first dealt with the application of art. 121 of Sch. 2 of the Indian Limitation Act, 1877, which provides that suits to avoid incumbrances in a patni taluk sold for arrears of rent must be commenced within twelve years from the date when the sale becomes final and conclusive, and therefore by inference permits suits to be brought within that time. But the learned judges observed that the adverse possession contemplated in these cases is possession which commenced after the creation of the patni tenure. They say truly that the principle is that the purchaser of the patni taluk at such a sale as the present takes the taluk in the state in which it was initially created; and after assuming the correctness of some decisions to which they refer, they add: "The purchaser takes the property not free merely of all incumbrances that may have accrued upon the tenure by the act of the defaulting proprietor, his representatives or assignees but also free of the interest acquired by an adverse possessor who has been able to acquire such interest by the inaction of the defaulting proprietor." But they add: "This doctrine is plainly limited in its application to cases where the adverse possession commenced after the creation of the patni. In a case in which the proprietor of the estate is out of possession, he cannot, merely by the device of the creation of a subordinate taluk arrest the effect of the adverse possession which has already commenced to run against him, and such possession would be effective not only as against the subordinate tenure holder, but also as against the superior proprietor. Consequently, if a plaintiff relies upon art. 121 of Sch. 2 of the Indian Limitation Act, he has to establish that the incumbrance which he seeks to annul is due to adverse possession which commenced after the creation of the patni." They then point out that "The District Judge has not found that in the cases before us the adverse possession of the defendants and their predecessors commenced after the creation of the patni. On the other hand, there is ample evidence that the adverse possession of the defendants and their predecessors commenced before the creation of the patni. There are traces on the record to show that there had been assertions of hostile title before the patni itself was created."

The High Court accordingly reversed the decision of the District Judge and dismissed all the suits.

The estate of the superior zamindar was created in 1799, and even assuming that there were no lakhiraj lands at the time of the creation of that estate, there would be room for the growth of interests by adverse possession between 1799 and 1807; and as the High Court observes, on the assumption that the possible interests acquired by the defendants by adverse possession constitute incumbrances which can be annulled, the defect of the plaintiff is that he has not established that the adverse possession of the defendants and their predecessors commenced after 1807.

It is here that the strong body of oral evidence, to which the learned District Judge apparently paid little attention, comes in. There is a mass of evidence to show that the defendants and their predecessors had occupied the lands in question revenue free for periods greatly exceeding twelve years, and there was no evidence of any suggestion in cross-examination to which their Lordships' attention could be drawn to show that this occupation had begun at any particular period. Apparently it went back as far as anything could be traced.

In the absence of any indication that these holdings as revenue free tenures had an origin either by creation or by the sufferance of a patnidar since 1807, their Lordships think that the High Court was right in saying that the proper presumption was that they ran back to a period antecedent to the creation of the taluk, or to put it in another way, that it lay upon the plaintiff to show an origin subsequent to the creation of the patni taluk if he were seeking to avail himself of S. 167 of the Act, and to annul these interests as incumbrances. In effect the judgment of the learned District Judge had given no weight to the evidence of possession. Whether this possession is to be attributed to the fact that the predecessors of the defendants were in by title lawfully created before the grant of the taluk in 1807, or to be attributed as counsel for the appellants insisted must be the case (if they were to prevail), to interests lawfully created before 1790, or is to be attributed to adverse possession acquired before 1807, makes no difference in the legal result.

The principle upon which their Lordships should proceed has been well expressed in the case of *Hurryhur Mookhopadya*

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v. *Madub Chunder* 1, "Again their Lordships think that no just exception can be taken to the ruling of the High Court touching the burden of proof which in such cases the plaintiff has to support. If this class of cases is taken out of the special and exceptional legislation concerning resumption suits, it follows that it lies upon the plaintiff to prove a prima facie case. His case is, that his mal land has, since 1790, been converted into lakhi-raj. He is surely bound to give some evidence that his land was once mal. The High Court, in the judgment already considered, has not laid down that he must do this in any particular way. He may do it by proving payment of rent at some time since 1790, or by documentary or other proof that the land in question formed part of the mal assets of the estate at the decennial settlement. His prima facie case once proved, the burden of proof is shifted on the defendant, who must make out that his tenure existed before December, 1790. "It may be objected that the result of this ruling may be that plaintiffs will sometimes fail, where under the former and looser practice they would have succeeded in assessing or resuming the land. But this can only happen by reason of the inability of the plaintiff to give prima facie proof of the fact which is the foundation of his title; a circumstance not likely to occur unless the defendants, or those from whom they claim have been long in possession of the tenure impeached. Nor is it, in their Lordships' opinion, to be regretted if, in such cases, effect is given to those presumptions arising from long and uninterrupted possession, which were heretofore excluded only by the exceptional procedure applied to resumption suits under the Regulations, which have now been decided to be inapplicable to suits of this nature, and by relieving defendants from the burden which every year made it more difficult to support."

It is right to add one observation. The case proceeded in the Courts below upon the footing that an interest not directly created by the talukdar, but allowed to grow up by his sufferance and negligence is an incumbrance within the definition given to that word in S. 161 of the Act. There is apparently a current of decisions in India to this effect, and their Lordships have, for the purpose of their judgment assumed, as the judges in the High Court assumed for their judgment, that this is correct. But it must not be taken that their Lordships

have expressed a final opinion upon the point, it being unnecessary that they should do so.

One further point remains. In order to be in a position to use the powers of S. 167, the purchaser must act "within one year from the date of the sale or the date on which he first has notice of the incumbrance whichever is the later." The plaintiff here did not act within one year from the date of the sale but it is suggested that he did act within one of his having notice. No point to the contrary was made in the Courts below the High Court, and no issue was taken. In these circumstances the High Court thought itself entitled to act upon the probabilities and to hold that the plaintiff must have had notice more than a year before he acted, and to decide against him on this ground also. Their Lordships cannot agree with this course of action, and if the point were now of importance they would have acceded to the application of the appellants, and remitted the case in order that an issue as to this point might have been stated and found. But as for the reasons already given they think the plaintiff has failed on the main point, it becomes immaterial to have this issue decided.

Their Lordships will therefore humbly advise his Majesty that this appeal should be dismissed. There being no appearance for the respondents, there will be no question as to costs.

Solicitors for appellant : Watkins & Hunter.

Appeal dismissed.

PRIVY COUNCIL.

PRESENT :—VISCOUNT HALDANE, LORD ATKINSON AND SIR JOHN EDGE.

[On appeal from the High Court of Judicature at Madras.]
Thiruvengkatasami Iyengar and another ... *Appellants.*

v.
Pavadai Pillai and others ... *Respondents.*

C. P. C. of 1882—Ss 36, 37—"Pleader duly appointed"—Meaning—Agent under special power of attorney—Pleader appointed by—Execution petition signed by agent and by pleader and not by party if and when enough.

Appellants, who held a decree for mesne profits and who were resident within the local limits of the jurisdiction of the court within which limits an application for the execution of the decree was to be made, executed a special power of attorney in favour of R, authorising him to, amongst other things, "execute Vakalat to vakils to sign execution petitions, put in affidavits and to conduct all necessary proceedings" R retained a pleader to present an execution petition verified by him (R), to examine, witnesses, argue, etc. An execution petition

No. 57 of 1919.

May 3-26-1921.

P. C.

Bipradas Pal
Chowdhury

v.
Kamini
Kumar.

Lord
Phillimore

P. C.

Thiruvengkatasami
Iyengar

v.
Pavadai
Pillai.

P. C.
Thiruveng-
katasami
Iyengar
v.
Pavadai
Pillai.

verified by R and signed, not by any of the appellants, but by R and the pleader and filed in the court concerned, held to have been duly presented, though R was not a "recognised agent" within the meaning of S. 37 of C. P. C., of 1882.

Under S. 36 of the Code of 1882, an application must be made or done by the party in person or by the recognised agent of the party, in person, or by the duly appointed pleader of the party in person.

Appeal (No. 57 of 1919) from a judgment and decree of the High Court (November 25, 1910) affirming a decree of the Subordinate Judge of Kumbakonam (September 30, 1907).

Kenworthy Brown for the appellants Respondents did not appear.

The judgment of their Lordships was delivered (May, 26.) by.

Lord
Atkinson.

Lord Atkinson. This is an appeal against the judgment and decree of the High Court of Judicature at Madras, dated November 25, 1910; which affirmed the decree of the Subordinate Judge of Kumbakonam, dated September 30, 1907, and made on an execution petition No. 279 of 1905.

The appellants are the punchayetdars of a temple and as such hold a decree for mesne profits against the respondents or their predecessors in title. Their petition praying for the execution of this decree was dismissed by the Subordinate Judge and his judgment was upheld by the High Court. From this latter decision the decree-holders have brought this appeal.

There were nine plaintiffs originally in the suit. All but three of them have died or resigned or been removed from the trusteeship.

The appellants, to use the words of S. 37 of the Code of Civil Procedure, 1882, are resident within the local limits of the jurisdiction of the Court within which limits the application by petition was to be made, and the sale applied for carried out. The case of the appellants does not come within any one of the sub-sections of S. 37. The execution petition No. 279 of 1905 was not signed by any of the appellants. It was signed by a pleader appointed in writing to make the application embodied in the petition, and that writing was filed in the Court.

Both the High Court at Madras and the Subordinate Judge of Kumbakonam held that this petition was not validly presented, because, to use the words of the judgment of the High Court, "The person who executed the vakalat to the pleader to act on his behalf was not a recognised agent of the decree-holder

as defined under S. 37 of the Civil Procedure Code, 1882, and could not have presented the application for execution himself. Under S. 36 of the Civil Procedure Code the pleader appointed can only do what might be done by the party on whose behalf he is appointed. The only question for their Lordships' decision is whether the construction in this passage put upon Ss. 36 and 37 of the Code of Civil Procedure is their true construction. Their Lordships do not think it is their true construction for this reason that it confounds the intending litigant, the pleader's client, with the intermediary by whom, as the agent of that litigant, the pleader is appointed to act on the litigant's behalf. The pleader is not appointed on behalf of the intermediary or agent to act on the agent's behalf, but by the agent on behalf of his principal, the litigant, to act on the litigant's behalf. The litigant is at once the principal of the agent and the client of the pleader. The lines of S. 36 of the Code of Civil Procedure immediately preceding the proviso run thus: "be made or done by the party in person or by his recognised agent or by a pleader duly appointed to act on his behalf." The possessive pronoun, "his" all through this sentence refers to the "party"—i.e., the litigant—not the intermediary or agent.

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Thiruvengatasami
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Lord
Atkinson

This construction gives a reasonable and natural meaning to the provisions of S. 36. The application is to be made or done by the party in person or by the recognized agent of the party in person, or by the duly appointed pleader of the party in person, while the other construction would leave entirely uncovered the case where the party himself in person without the intervention of any agent duly appoints his own pleader to act on his own behalf.

In the present case, the appellants on September, 8, 1902, executed not a general power attorney, but a special power of attorney in favour of one Raghava Naiken authorising him on their behalf to, amongst other things, "execute vakalat to vakils to sign execution petitions, and put in affidavits and to conduct all necessary proceedings" in this suit. On the same day this same Raghava Naiken, the appellant's agent, authorized the pleader to appear in the Tanjore Court to present the execution petition verified by him, the agent, to examine witnesses, argue, etc. No doubt the words run: "to appear on my behalf, in the Tanjore Court"; and he describes himself as general

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 Thiruv-
 katasami
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 —
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agent of the appellants under a general power of attorney, but that was a misrecital. The power of attorney was not a general power of attorney, but a special one, and the words, on my behalf are misleading. The execution petition was to be presented on behalf of the appellants; they were the only persons who had the right to put the decree into execution and have the property of the debtors attached and sold.

Their Lordships are therefore of opinion that the judgment appealed from, as well as that of the Subordinate Judge which it affirmed, was erroneous, and should be reversed, and a declaration made that the appellant's decree should be put into execution. They will humbly advise his Majesty accordingly.

The respondents will pay the costs of the appeal.

Solicitors for appellants : Borrow Rogers & Nevill.

Appeal allowed.

PRIVY COUNCIL.

PRESENT :—VISCOUNT HALDANE, LORD ATKINSON AND SIR JOHN EDGE.

On appeal from the High Court at Madras.

Jagannatha Bheema Deo. ... *Appellant.*

v.

Kunja Behari Deo. ... *Respondent.*

Registration Act—S 17 (3)—Will—Authority to adopt not conferred by will Deed, construction—Registration—Necessity.

P. C.
 Jagannatha
 Bheema Deo
 v.
 Kunja
 Behari Deo.

Where a document executed by a Hindu in favour of his wife and called a will in the body of it, after reciting that the executant had been laid up with severe bodily illness for some months past; that he consequently had had serious misgivings, and that he had not till then been blessed with an heir apparent, provided "I have consented to your adopting a son at your pleasure and conducting the management of the estate in the best manner. None of my heirs shall have cause to raise disputes touching this matter. Held that the document was not a will, but only a power to adopt and as such ought to have been registered as being an authority to adopt a son, not conferred by a will within the meaning of S. 17 of the Registration Act, 1877.

The references to property that occur in the document are no more than consequences of the guardianship of the wife and the character of being a will is not established independently of these.

Appeal (No. 55 of 1920) from a judgment and decree of the High Court (September 12, 1918) affirming a decree of the District Judge of Ganjam.

Ken worthy Brown with him De gruyther K. C. for the appellant.

Hon. Sir William Finlay K. C. and Parikh for the respondent.

The judgment of their Lordships was delivered (10th May 21) by.

May 10, 1921.

Viscount Haldane. This case is an important one, and but for a preliminary point on which it turns, might have been a long one. There is, however, a preliminary question which goes to the root of the appeal. Sri Sri Brojo Kishoro Deo executed a document in favour of his wife on August 14 1906. He called it a will, in the body of the document ; but its only operative contents are to be found in the words which follow: " I have been laid up with severe bodily illness for about the last seven months. Consequently having had serious misgivings, and not having until now been blessed with an heir-apparent for want of divine favour, I have consented to your adopting a son at your pleasure and conducting the management of the estate in the best manner. None of my heirs shall have cause to raise disputes touching this matter. This will has been executed with my consent."

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 ———
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 Haldane

It will be observed that what is said by the writer of the document is that having had serious misgivings, and not having been until now blessed with an heir-apparent, he has consented to his wife adopting a son at her pleasure, and conducting the management of the estate in the best manner. That standing by itself appears to their Lordships to be no more than a present authority to the wife to make an adoption, and there is nothing else of substance in the document. It may be that the writer was in a position under the law applicable to give her such power, but whether he was or was not, he purports to give her nothing else ; for the references to property that occur in it are no more than consequences of the guardianship of the wife, and the character of being a will is not established independently of these. Their Lordships therefore agree with the learned judges in the High-Court in thinking that the document is not a will, but only a power to adopt, and as such ought to have been registered as being an authority to adopt a son, not conferred by a will within the meaning of S. 17 of the Indian Registration Act, 1877.

Their Lordships will, therefore, humbly advise his Majesty that this appeal should be dismissed with costs.

Solicitor for appellant : Douglas Grant.

Solicitors for respondent : Chapman-Walker and Shpehard.

Appeal dismissed.

PRIVY COUNCIL.

PRESENT :—VISCOUNT CAVE, LORD SHAW AND MR. AMEER ALI.

[On appeal from the High Court at Madras.]

Kuthali Moothovar

... Appellant.

v.
Perinati Kunharankutty

... Respondent.

P. C.
Kuthali
Moothovar
v.
Perinati
Kunharan-
kutty.

Limitation—Adverse Possession—Proof—Onus—Quantum—Forest land incapable of cultivation—Suit for, by person having title—Plea of adverse possession by defendant—Possession by plaintiff sufficient to displace plea—What amounts to.

Standing a title in "A" the alleged adverse possession of "B." must have all the qualities of adequacy, continuity and exclusiveness which should qualify such adverse possession. But the onus of establishing these things is upon the adverse possessor. Accordingly when the holder of title proves that he too has been exercising during the currency of his title various acts of possession, then the quality of these acts even although they might have failed to constitute adverse possession as against another, may be abundantly sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which is demanded from any person challenging by possession the title which he holds. 39 M. 617, P. C. Foll.

Forest land, very little of which is capable of, or has been subject to, cultivation, is far removed as a subject of definite possession from lands under continuous and permanent cultivation, compactly situated and capable of being remembered with identification as the lands held and occupied in articulate plots or under leases.

Appeal (No. 85 of 1919) from a judgment and decree of the High Court (December 3, 1917) so far as it reversed a decree of the Subordinate Judge of Tellicherry.

De Gruyther K. C. Kenworthy Brown and Palat for appellant.

Hon. Sir William Finlay K. C. and Narasimham for the respondent.

The judgment of their Lordships was delivered (8th July 21) by

Lord Shaw
of
Dunfermline.

Lord Shaw of Dunfermline. This is an appeal from a decree dated December 3, 1917, of the High Court of Judicature at Madras, which allowed in part an appeal from a decree dated March 20, 1916, of the Court of the Temporary Subordinate Judge of Tellicherry. The suit was brought by the present appellant to establish his title to thirty-four hills in the North Malabar district. The decree of the Subordinate Judge was in favour of the respondent with regard to ten of the hills, comprising, roughly stated, the north and north-east portion of the group of thirty-four. No question is raised in this appeal

with regard to those ten hills, it being conceded that the defendant has a title thereto.

The still outstanding issue between the parties, however, is as to the remaining group of hills, twenty-four in number, which may be said in general terms to form the southern half of the entire group which was originally in suit and to be bounded on the south by the Peruvanna River. With regard to those twenty-four hills, the decree of the Subordinate Judge was in favour of the plaintiff, while the judgment of the High Court favoured the defendant. The plaintiff has appealed to this Board.

The appellant is the head or karnavan of a Nayar tarwad or family in Malabar, called on the record the Kuthali Nayar. The defendant in the suit was, and the respondent in the present appeal became on his death, the head or karnavan of a Moplah tarwad in the same district. Shortly put, the question in the appeal is: are the lands which are the subject of the appeal the property of the Kuthali, the appellant's family, or of the Moplah, the respondent's family?

Although the proceedings are voluminous, their Lordships desire to say at once that the appeal in their judgment must be settled by applying a well-known doctrine of law to the complex and somewhat contradictory mass of evidence as to the possession of these hills.

Both parties claim them. Both parties claim to have possessed them. And upon a balance of the evidence it has been found by the High Court that the respondent's possession upon the whole outweighs that of the appellant, and that accordingly the respondent is entitled to prevail.

Upon this subject of possession much importance attaches to the nature of the property itself. It is forest land apparently very little of it capable of, or at least up to the present subject to, cultivation and growing here and there stretches of timber. It is quite clear that a property of this nature is far removed as a subject of definite possession from lands under continuous and permanent cultivation, compactly situated and capable of being remembered with identification as the lands held and occupied in articulate plots or under leases.

Their Lordships sympathize with the difficulties which confronted the Courts below, as to the possession of the pro-

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perty under appeal, and they agree with what is apparently the view of both Courts that such possession has to be interpreted according to the fairest view of what the property itself was capable of in the way of possession and what upon a broad view would be considered an adequate assertion of title by sufficient occupation. Along with this observation their Lordships desire further to remark that they are not certain that they would have been prepared to reverse although no definite opinion is here given—the conclusion reached by the High Court had the case before the Board been one merely of a question of the balance of evidence as among rival possessors. How nebulous the situation is may be gathered from these passages in the judgment of the High Court : “From 1871, the evidence as to possession consists mainly of certain leases either for cutting trees or of the usufruct generally of the hills, for none of the parties seem to have directly exercised any definite acts of possession. Besides these leases, the evidence relates to what is called ‘punam’ or fugitive cultivation. Punam cultivation is thus described in the Gazetteer of the Malabar District, vol. I., p. 220 : It is a most destructive form of cultivation, with ruinous effects upon forest growth. A patch of forest is cleared and burnt, trees too big to be burnt being girdled and left to die. A crop of hill rice, mixed with which dholl, millet and plantains are often grown, is raised, and the ground is then left fallow for some years, the cultivators, generally hill-men, moving on to another patch to repeat the process. As regards punam cultivation, the evidence on either side cannot be said to be very satisfactory and from the nature of the leases granted for cutting trees acts of possession of that character would not by themselves be regarded as conclusive evidence in support of the case of either party.” Their Lordships accept the general description of possession as here given.

But when the judgment proceeds “But such is the nature of the evidence of possession adduced in the case, and we have to find by comparison of the evidence on both sides judged in the light of probabilities, who in fact is shown to have been in possession of the property” their Lordships cannot apply the rule there laid down. For the Board is of opinion that in the competition of title to this ground the appellant definitely prevails, and that any doctrine of balance where original title was unknown, cannot apply to this case. Upon that subject

the High Court expresses itself to the effect that : " It is not now possible apart from these decrees (of 1864 and 1867) to come to any definite conclusion on the merits of the claim of either party so far as title is concerned." It is thus necessary to consider these decrees, for one or other of them has been treated by the parties as the foundation of their respective titles.

In the year 1864 Kutti Pocker, head of the Moplah family, brought a suit for dispossession of one Kunhassan from the lands, on the ground that a lease of the same for three years from the year 1859 had expired. Kunhassan in defence stated, however, that the lands to which the suit referred were to a large extent overstated, and that in particular the hills the property of which is now under appeal were possessed by him under a right conferred, not by the Moplah, but by the Kuthali family. In these circumstances the then head of the Kuthalis, one Achutan *alias* Achammadathil Nayar, was conveyed by a supplemental suit as defendant. He was at that time the head of Kuthali family, but for some reason not sufficiently explained he did not defend the action nor take any steps to protect the Kuthali family interest.

The suit proceeded for a period of about three years and was about to be brought to a close by decree, February 13, 1867, when another suit (O. S. N. 11 of 1867) was raised by Nuchiledathil Krishnan *alias* Kuthali Chathoth Nayar. It is said that this suit was brought only by a reversioner in the Kuthali rights, and this is true, but it must be noted, first, what was the reason for that litigation, and second, what was the true scope of the suit.

As to the reason, there can be no doubt. It is thus recited in the judgment of November 4, 1868. "Plaint recited that the two groups are the jenm property of the sthanam of Kuthali Nayar to which plaintiff is entitled to succeed on the death of the 1st and 3rd defendants, that 1st defendant the present incumbent of the above sthanam having allowed 3rd defendant to manage the sthanam and the latter by his extravagance dissipated the sthanam property. Plaintiff has already filed Suits Nos. 117 and 120 of 1863 to remove them from the management of the sthanam property that the said defendants have therefore colluded with 2nd defendant and refused to adduce any proof

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in Suit No. 25 of 1864 in support of the sthanams' right to the thirty-four hills which the 2nd defendant had fraudulently included in the suit as portions of his two hills : that if 1st and 3rd defendants who possess only a life-interest in the sthanam property be allowed to ruin a portion of it by neglecting to defend the suit, a great injury will result to plaintiff's right of reversion and that he therefore prays that a declaration protecting his right may be given under S. 15 of the Civil Procedure Code."

If these facts, the substance of which was held to be proved are accepted, it appears to be plain that the Courts were properly appealed to to prevent a decree being granted against the Kuthali family to its prejudice by reason of neglect amounting to malfeasance upon the part of its head.

Upon the second point-namely, the scope of the suit-there can be no question. Its object was to exclude (*inter alia*) the lands which are the subject of this appeal from falling within the scope of the decree in the suit of 1864, by reason of this, that they belonged to the Kuthalis. This was the true issue in the 1867 case, and the last important point in regard to it is that that suit was fought out, and fought out by the proper contradictors, namely, the Moplah family. That family was represented by the defendants 4 and 5, namely, Ibrayi, and Amanath. Pocker, the head of the Moplahs, had just died, and Ibrayi and Amanath appeared in his stead and defended the 1867 suit, maintaining, in opposition to the plaintiffs therein, that the lands in question were in fact Moplah property.

In these circumstances it appears to their Lordships not only that the suit of the later year 1867 was one which definitely dealt with the question of property now under appeal, but that it would be unreasonable to endeavour to found rights under a decree of 1864 by ignoring the proceedings of 1867. In any view of the case it must be admitted that the later proceedings were at least of an interpretative character ; they were directed to the avoidance of mistake as to the ambit or scope of the 1864 litigation, and to ignore them and to treat the 1867 proceedings either as if they had never been brought or were of no avail is in their Lordships' opinion contrary to sound principle. The description of the suit itself in the judgment of 1867

makes it clear that: "This suit is brought to procure a decree declaring that two cherikkals (groups) consisting of thirty-four hills are not included within the boundaries of 2nd defendant's two hills called Pakkath Villiyari for which he has brought a Suit No. 25 of 1864 against 3rd defendant and others and establishing plaintiff's reversionary right to those thirty-four hills valued at Rs. 1,500."

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Putting all the proceedings, therefore, together, the question that remains for the Board on title is to see what is the scope of the judgment in the 1867 proceedings, which were conducted between these rival families and in *foro contentioso*.

Upon that subject the judgment in the Court of the Principal Sadr Amin of Tellicherry, of November 4, 1868, is clear and is final. The learned judge says that: "Upon a consideration of these circumstances I am of opinion that the Decree No. 25 of 1864 is not binding upon the plaintiff. The next question," he adds, "is one of boundaries." The learned judge discusses that, and after referring to the report of a commissioner who held a local investigation, he concludes: "Upon the above grounds I am of opinion that the middle stream in the Commissioner's plan represents the Alamb river mentioned in the defendant's documents and that the twenty-four hills situated on the southern banks of that river constitute the Pannikottur group . . . For the foregoing reasons I declare that the plaintiff (*i. e.*, the Kuthali family) is entitled to the reversion of the first twenty-four hills which are proved to be the jenm of Kuthali sthanam and reject his claim to the remaining hills (twenty-five to thirty-four)."

In the opinion of the Board it is thus definitely settled that the title to the twenty-four hills the property of which is under appeal is in the Kuthali family.

Their Lordships think that the High Court erred in not treating the case from this point of view. It is not a case of doubtful title, but of clear title. Had the High Court been of the opinion that the title of the appellant was clear, it is very probable that they would have reached the result, on a review of the evidence and of the law about to be stated, that no contrary right to these properties has been acquired by the Moplah family by reason of possession. The rule stated by

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this Board in *Radhamoni Debi v. Collector of Khulna* ¹ seems to be very applicable to the present case. It is as follows: "It is necessary to remember that the onus is on the appellant, and that what she has to make out is possession adverse to the competitor. That persons deriving from her any right they had have done acts of possession during the twelve years in controversy may be conceded, and is indeed evidenced by the dispute which ended in the Magistrate's order of 1885. But the possession required must be adequate in continuity, in publicity, and in extent to show that it is possession adverse to the competitor. The appellant does not present a case of possession for the twelve years in dispute which has all or any of these qualities. The best attested cases of possession do not cover the whole period, and apply to small portions of the ground."

The Board thinks that the learned Temporary Subordinate Judge of Tellicherri approached the case correctly from this point of view, and so approaching it the Board, after full consideration, accepts his analysis of the evidence and is of opinion that possession upon the part of the respondent of these hills has not been adequate "in continuity, in publicity, and in extent" so as to "show that it is possession adverse to the competitor." That competitor is the appellant, and the foundation of his title is the judgment of 1868 which has just been cited.

Their Lordships cannot part with the case without referring to and following the doctrine of onus probandi in such cases, as laid down by this Board in *Secretary of State for India in Council v. Chelikani Rama Rao* ². Standing a title in "A," the alleged adverse possession of "B" must have all the qualities of adequacy, continuity and exclusiveness which should qualify such adverse possession. But the onus of establishing these things is upon the adverse possessor. Accordingly when the holder of title proves, as in their Lordships' view he does with some fullness prove in the present case, that he too has been exercising during the currency of his title various acts of possession, then the quality of these acts, even although they might have failed to constitute adverse possession as against another, may be abundantly sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which is

(1) L. R. 27 I. A. 186, 140.

(2) L. R. 45 I. A. 192 39 Mad.

demanding from any person challenging by possession the title which he holds.

Their Lordships will humbly advise His Majesty that the appeal be allowed, the decree of the High Court set aside, with costs, and the decree of the Subordinate Court restored. The respondent will pay the costs of the appeal.

Solicitors for appellant: Chapman-Walker and Shephard
Solicitor for respondent: Douglas Grant.

— Appeal allowed. —

PRIVY COUNCIL.

PRESENT:—VISCOUNT HALDANE, LORD ATKINSON AND SIR JOHN EDGE,

On appeal from the High Court at Calcutta.

Chandra Kanta Das (Since Deceased) ... *Appellant.*
v.

Parasullah Mullick ... *Respondent.*

Contract Act—S. 27—Exception to—Restraint of Trade—Contract in—Goodwill—Sale of—Distinction—Validity.

The appellant and the respondent, who had each passengar ferry-boats on a river and who had had controversies, entered into agreements, under one of which, called the kistibandi bond, executed by the respondent in favour of the appellant, the former purported to buy from the latter the goodwill of his trade in plying the ferry-boats, and every description of interest and ownership which the appellant had acquired in several river landing-places for plying the boats as well as the settlements obtained for the collection of tolls. The price was to be Rs. 5400, payable by instalments, with interest, and if default was made in payment of any instalment the entirety was to become due at once. No question of title was to be raised by the Respondent. On or about the same date as that of the kistibandi bond, the appellant executed, in favour of the respondent a kobala or agreement under which the appellant contracted that, in consideration of the Rs. 5,400, he sold his rights in the landing-places and settlements and in the goodwill of the business of plying the ferry-boats, and that he ceased to have any rights thereto. The respondent was to be able to enjoy and possess these rights by exercising whatever right the appellant had in them, and the latter was not to be able to make any obstacle in the respondent's enjoyment of the same. The appellant further undertook to close the business of plying the particular ferry-boats, and that if he ever carried on the business again he would return the whole amount of the consideration. *Held*, on a construction of the agreements, that the transaction amounted to a sale of a real goodwill and came within the exception to S. 27 of the Contract Act and was valid.

Appeal (No. 21 of 1920) by special leave from a judgment and decree of the High Court (January 31, 1917) varying a decree of the Subordinate Judge of Khulna.

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 Perinati
 Kunharan-
 kutty.

P. C.
 Chandra
 Kanta Das
v.
 Parasullah
 Mullick,

P. C.

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Kanta Dās
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Viscount
Haldane.

Sylvian Mayer K. C. and *H. N. Sen* for the appellant.
The Respondent did not appear.

THE JUDGMENT OF THEIR LORDSHIPS WAS
DELIVERED (9th May, 1921) BY

Viscount Haldane. The question in this appeal arises in a suit by which it was sought to have decided that the plaintiff, who is the appellant, was entitled to recover a sum of Rs. 5400, with interest amounting to Rs. 67-8, as due to him under certain agreements. The defence was a charge of fraud in obtaining the agreements, and as a separate defence, that the main agreement was invalid as being in restraint of trade. The learned Additional Subordinate Judge of Khulna in Bengal, who tried the case, decided it in favour of the appellant for the modified amount of Rs. 5,280, the difference being given on the footing that the respondent (being the defendant) was entitled to a small amount for compensation, on the ground of partial failure of consideration. As to this difference, no substantial controversy has been raised, and their Lordships do not think that any question is before them for decision in relation to it.

When the case went on appeal to the High Court at Fort William, the decree of the Subordinate Judge was reversed. Chatterjee, J. held that the parties were never ad idem, the respondent having been misled by the appellant, and further that there was no real goodwill to assign, such as was the basis of the agreement on the part of the appellant. But he thought that as the respondent had entered into possession on the footing of the agreement, although inoperative, he ought to make compensation to the appellant to the extent of Rs. 1000. Walmsley, J., the other member of the Appellate Court, was of opinion that there was nothing fraudulent to render the agreement inoperative on that ground. But he held that it was void as contravening S. 27 of the Indian Contract Act, which makes every agreement by which any one is restrained from exercising a lawful profession, trade or business, void. The trial judge had been of opinion that the case came within the exception to the section which provides that it is not to apply where there is a sale of the goodwill, but Walmsley, J. held otherwise, on the ground that there was no real goodwill.

The appeal comes before their Lordships *ex parte*, and they have scanned the case presented for the appellant with some closeness. But, particularly, having regard to the fact that the learned judge who tried the suit found that there was nothing to establish fraud on the part of the appellant in obtaining the agreement, and that this opinion met with the concurrence of Walmsley, J., and also because of the character of the evidence itself, they are of opinion that the agreement was, apart from the point of law arising under the Indian Contract Act, a valid agreement.

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All that it is necessary to observe is that there was a dispute between the appellant and the respondent. Each of them had passenger ferry-boats on a river. The respondent had entered on this business first. But he had not been prosperous, and the appellant gained an advantage over him by securing better landing-places and negotiating facilities for collecting dues. In 1910 the parties, who had had controversies, entered into agreements for putting an end to them. Under one of these, called the kistibandi bond, executed by the respondent in favour of the appellant, the former purported to buy from the latter the goodwill of his trade in plying the ferry-boats, and every description of interest and ownership which the appellant had acquired in several river landing-places for plying the boats, as well as the settlements obtained for the collection of tolls. The price was to be Rs. 5400, payable by instalments, with interest, and if default was made in payment of any instalment the entirety was to become due at once. No question of title was to be raised by the respondent.

Default in payment was made, and the appellant has instituted the present suit. Much evidence was taken on the question of fraud, but for the reason already given their Lordships do not think it necessary to enter on this question. It has been, in their opinion, satisfactorily disposed of in the Courts below. The question that remains is that raised as to the operation of S. 27 of the Indian Contract Act. This section has, under the express exception which it contains, no application if there was here a genuine sale of the goodwill of the business. It ought to be observed that, in addition to the transfer of goodwill and other assets already referred to, there was an agreement or *kobala* executed about the same date by

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the appellant in favour of the respondent. Under this document the appellant contracted that, in consideration of the Rs. 5400, he sold his rights in the landing-places and settlements and in the goodwill of the business of plying the ferry-boats, and that he ceased to have any rights thereto. The respondent was to be able to enjoy and possess these rights by exercising whatever right the appellant had in them, and the latter was not to be able to make any obstacle in the respondent's enjoyment of the same. The appellant further undertook to close the business of plying the particular ferry boats, and that if he ever carried on the business again he would return the whole amount of the consideration.

Their Lordships are of opinion that this transaction amounted to a sale of a real goodwill, and they are unable to agree with the views expressed in the judgment of the High Court. They entertain no doubt that what took place was a sale of the goodwill, within the meaning put on the expression in such cases as *Churton v. Douglas* ¹; *Trego v. Hunt* ² and *Inland Revenue Commissioners v. Muller* ³; and as used in the same sense in S. 27 of the Indian Contract Act. Accordingly, they are of opinion that the decree of the Subordinate Judge must be restored, and that the appellant is entitled to his costs of this appeal and in the High Court. They will humbly advise His Majesty accordingly.

Solicitors for appellant : G. & W. Webb.

Appeal allowed.

1. (1859) 10 L. J. 174.

3. (1901) A. C. 217.

2. (1896) A. C. 7.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—SIR WILLIAM AYLING, OFFICIATING CHIEF JUSTICE AND MR. JUSTICE ODGERS.

Chinnappa Pillai and another ... Appellants * (Defendants 1 and 6).

v.

Kailasam Pillai late a minor but now declared a major vide order dated 28th April 1921 on C. M. P. No. 535 of 1921 and others

... Respondents (Plaintiff and Defendants 2 to 5 and 7.)

Wills-Implied revocation—Testator disposing of property differently in the later will—Intention sole guide—Later will not providing for the whole subject matter of the first will, immaterial—Legacies for the same objects in both the wills, if taken cumulatively exceeding the value of the estate, later will revokes the former.

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Where a testator has died leaving two wills and an intention can be gathered from the terms of the later will to dispose of his property in a manner different from the dispositions in the former will, the earlier will stands revoked. The intention is to be the guide and it does not matter if the second will does not provide for the whole subject matter of the first will.

Williams on Executors 10th Edition Vol. I page 119. *In the Goods of Petchells' and Lemages v. Goodban* (2) and *Dempsey v. Lawson* (3) followed.

Where legacies are provided to the same persons in both the wills and if they are taken to be cumulative they would amount to more than the total value of the estate of the testator, revocation of the prior will, will be implied from the terms of the later will *Cluchester v. Quartrages* (4) and *In the Estate of Bryan* (5) followed.

The following are the material portions of the documents, considered by their Lordships.

Ex. A:—(Will dated 2—1—1914) As the wills previously executed by me have not been brought into force, all the dispositions mentioned herein shall be operative after my life-time. Rs. 21,504 is the amount of outstandings due to me as detailed in the schedule annexed hereto. Out of this sum of Rs. 5,000, (five thousand) for gilding the silver mancham which I have made and presented for the Goddess in the Nataraja Temple at Chidambaram; Rs. 500 (five hundred) to younger brother's son Sadasivam; 1,000 (one thousand) for feeding, presenting fruits and cloths to strangers and performing Gutupooja in connection with my burial and funeral ceremonies, this shall be given to both of my younger brothers and spent by them; Rs. 5,000 for maintenance to Kailasam, son of Valliammal, aged 13 and who is brought up by me from his childhood, this sum of Rupees five thousand shall be lent on interest by the Willdar (executor) as he likes till his minority ceases and out of the income

1. 3 P. & D. 153.

3. 2 P. D. 98 at page 105.

2. L. R. 1 P. D. 57 at p. 62.

4. (1896) P. 186 at page 189.

5. (1907) P. 125.

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expenses, in connection with his education and messing shall be paid for every year to his mother. He shall be frequently supervised and after he ceases to be a minor the aforesaid sum of rupees five thousand shall be paid to him and receipt taken from him.

My wife Sithai Ammal and my junior maternal aunt (?) Ammakutti Achi shall each be paid Rs. 120 every year for their maintenance out of the interest on Rs. 3,000 and after their life-time, the money shall be utilised for any charity specified by them. My wife shall, during her life-time have the right only to enjoy my ancestral house with all privileges. With the balance of Rs. 5,500, five thousand five hundred, the executor shall according to his will and pleasure arrange to conduct a permanent charity in my name in Chidambar Nataraja temple; the manai to the north of Theradi Pillaiarkoil at Chidambaram which I have been enjoying for about 25 years by leasing out taking cowle deed and paying Municipal tax &c. shall be in your possession and custody on behalf of minor Kailasam and shall be delivered possession of to him by you after he ceases to be a minor, the said manai including garden shall be enjoyed by Kailasam with all rights and with powers to make alienations by way of sale, &c., should the executor fail to carry out (the instructions) as detailed above, every individual mentioned herein shall obtain relief by means of civil suits. Besides the Wills executed by me prior to this, I have given herewith, notes and hypothecation deeds mentioned in the schedule and details about the outstandings due to me. (Sd.)

Ex. A (1):—(Will dated 24—1—1913.) As I feel weak often and as the wills previously written by me are not operative, this will containing the following dispositions shall come into force after my life time . . . The said Ramaswami Chettiar Avergal shall under the right of this will; with all rights collect either amicably or through Court all the amounts due to me under pronotes and hypothecation deeds; out of the amounts collected by you, you shall reserve Rs. 5,000 till minor Kailasam Pillai, son of Valliammai, daughter of Jaffna Ramu Pillai, who is brought up by me, attains majority and pay the same to him afterwards. Until he ceases to be a minor the interest on the said sum of Rupees five thousand shall be paid every year to Valliammai Ammal guardian and mother of the minor and receipts taken from her. A sum of Rs. 500 shall be paid for both the said Valliammai and her minor daughter and receipt taken. As my wife Seethai Ammal has no issue male or female, a sum of Rs. 120 shall be paid for her every year for her maintenance and the receipt taken from her. A sum of Rs. 120, one hundred and twenty shall be paid every year to my junior maternal aunt Senlanangudi Ammakutti for her maintenance in the same way as I have been paying hitherto and receipt taken from her. The Willdar (executor) shall according to his will and pleasure spend up to an extent of Rs. 2,000 (two thousand) towards my burial and funeral expenses and towards Pavadai (Naivedyam) to be offered daily for ten days in front of Chidambaram Natarajar; out of the balance amount, the executor shall conduct Abishekam and Nivedanam for Dakshinamurthy and Subramaniam in Chidambaram Natarajar temple Sannadhi which I had been conducting and which have since ceased and he shall also arrange for the offering of Kulathalli in the Sannadi, the Sugar Pongal and the performance of Archana to the Moolastana Goddess on every Friday, and the evening Abishekam, Nevidanam &c., to Karpooora Pillaiar without any omission.

My wife shall during her life time occupy with all rights, the house facing south situate in Komandan Street, Manuargudi, which I got under the partition, and have been enjoying; and after her death, Muthayyan, son of my brother Thillai-nayakam Pillai shall enjoy the same with all rights. If the executor does not carry out the dispositions herein the persons mentioned in the will, shall realise (their dues) through Court. Minor Kailasam on his attaining majority may receive

the sum of Rupees five thousand referred to in the 1st page. For the education and maintenance of the minor, interest shall be paid every year to his guardian and mother Valliammai. Out of the balance left after deducting the amounts spent as stated above, the executor shall conduct any charity he likes; he shall also arrange for the proper conduct of charities after his life time. The flower garden belonging to me and situate in Theradi Pillaiar Koil Street at Chidambaram shall also be used for charity. All the dispositions herein have been made by me with good heart while I am in a sound state of mind in order that I may attain salvation as I have no male issue. If any one either obstructs these arrangements or with evil intention causes hindrance, or spoils these through the Court or through the Sircar, the sin of killing a black cow shall fall on his head. If, with the sum of Rs. 5,000 referred to in the Varthamanam letter given by Chinna Pannai Vadivelu Pillai, Tiruppani work of Kailasa Natharkoil be not finished within the period of 3 years as mentioned therein and Kumbabishekam not performed, the executor shall collect the amount under the terms of the Varthmanam and utilise the same in any manner he likes for Nataraja temple. As a true copy of this written in my own hand has been sent to the executor Ramaswami Chettiar Avergal, I have given this to Valliammai in order that she (Valliammai) and her minor (son) Kailasam may get their dues and in order that my will may be brought into force in public. This shall come into force after my life time.

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Appeal against the decree of the District Court of South Arcot, dated the 31st March 1919 in Original Suit No. 13 of 1919.

A Krishnaswami Aiyar and K. Balasubramania Aiyar for appellants.

T. R. Ramachandra Aiyar, S. Muthiah Mudaliar, A. Suryanarayana, T. Muthia Pillai and K. Sankara Rayar for the respondents.

The Court delivered the following

Judgment:—In this appeal two alleged testamentary papers of one Venkatachalam Pillai, deceased, who died on 26-8-14 are in question. They are dated respectively 24-1-13 and 2-1-14 and are marked as Exs. A1 and A. The latter is propounded by a minor Kailasam Pillai, son of Venkatachalam by a concubine of his, Velliammai, by name. This Kailasam Pillai applied to the District Court of South Arcot for leave to prove A and for the issue to him of Letters of Administration with this will annexed. A1, the alleged earlier will, is propounded by respondents No. 3 and 4 who are two of the three sons of Thillai Nayagam Pillai brother of the testator, who was adopted into another family. The learned District Judge found for the genuineness of both these papers, A and A1, and admitted them both to probate. He also found that the earlier will was not revoked by the later. Letters of Administration were

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granted jointly to the widow of deceased (Respondent No. 2) and respondents Nos. 3 and 4.

Three questions are raised on this appeal.

1. The genuineness of the wills.
2. The revocation of the earlier by the later.
3. Inferential intention to revoke.

As to the first point, Mr. A. Krishnaswami Iyer for the appellants, the divided brother of the testator and his son, frankly stated that he could not say the wills were forgeries, *i. e.*, were not in the handwriting of the testator. We think it sufficient to say that we are satisfied from the evidence that the wills A (1) and A are in the handwriting of the testator. We were then asked to refuse Letters of Administration on the ground that the history of the custody of these documents was not satisfactory and was not such as to remove all doubt as to their genuineness. The story of the concubine, who is the only witness who saw the testator write and sign the wills, is that the two wills were given to her. After the death she put them into a box and gave them to her servant from whom 5th respondent took the wills. 5th respondent is the third of the sons of Thillainayagam Pillai mentioned above. There is evidence that after cremation the 3rd and 5th defendants and one Vadivelu Pillai (P. W. 2) and Monigar Ratnam Pillai (P. W. 4) met and opened the box and took out the wills and read them. The wills were actually produced by Vadivelu Pillai in the court of the District Munsif of Mannargudi in O. S. No. 47 of 1915 filed by Vallammaji to recover these wills and other documents. On the other hand the 1st respondent's (1st appellant here) account is that deceased gave him a box containing mortgage and other documents and that when the testator died there was no box by his side as described by the plaintiff's witnesses. The District Judge who has examined the evidence with care has come to the conclusion that the account given by 1st appellant cannot be accepted and a further examination of the evidence does not lead us to a different conclusion. We therefore agree with the District Judge that there is no reason why these paper writings, A and A1, should not be received as the testamentary papers of the deceased.

The third point was not argued and we are not prepared to say that inferential intention to revoke *i. e.*, any conclusive

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evidence of such intention derived from evidence of surrounding circumstances apart altogether from any inference to be derived from the provisions in the documents themselves, is in any way established. If there is in fact an intention to revoke the earlier will by the latter it must be gathered from inferences drawn from the documents themselves.

This leads us to the second point which was argued at length before us. A somewhat detailed examination of the two wills will be necessary. The earlier one (A 1) was in favour of Ramasami Chetty the executor-who renounced. It begins "As I feel weak often and as the wills previously written by me are not operative, this will containing the following dispositions shall come into force after my life time." The testator sets out a list of property owing or belonging to him and aggregating Rs. 18012/-. He leaves Rs. 5,000/- to Kailasam Pillai, and the interest to his mother as his guardian during his minority, Rs. 500- to Valli Ammal and her daughter, Rs. 120- each annually to his wife and aunt and Rs. 2,000- for his funerals and for Neivedyam. Out of the balance the executor is to perform abishekam, Neivedyam and *Kulathali*. To the wife is further given the house in Mannarkudi for life, remainder to Mottayan (3rd respondent). Out of the balance the executor is to conduct any charity he likes. The flower garden at Chidambaram is left to charity. The Rs. 5,000-due on Varthamanam by Vadivelu Pillai is to be recovered and used for Nataraja temple if the Tiruppany work done by Vadivelu is not done in 3 years Ex. (G.) The testator adds that a copy of the will has been sent to the executor. This is denied by Mr. Ramaswamy chetty in a letter to the vakil for Valliammai (Ex. E.)

The later will (Ex. A.) is also executed in favour of Ramaswami chetty and begins "As the wills previously executed by me have not been brought into force, all the dispositions mentioned herein shall be operative after my lifetime".

Rs. 21,504 is said to be the amount of outstandings due to the testator as detailed in the schedule. There is no schedule to the paper. This will begins with four new legacies, viz., Re. 5,000- for gilding the silver mancham in Nataraja temple ; Rs. 1,000, to Mottayan ; Rs. 500, to Sundaramurthy (4th respondent) and Rs. 5,000 to Sadasivam (6th respondent):

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The legacy of Rs. 5000 to Kailasam, interest to be paid to his mother during minority appears also in the will. The legacy of Rs. 500,- to Valliammai and her daughter is omitted; probably because in the interval between the two wills the testator had endorsed 17 pronotes in favour of the former. The legacies to his wife and aunt are the same but they are specified as to be derived from the interest on Rs. 3,000,- which after their lives is to be devoted to "any charity." The amount of Rs. 2,000 for funerals etc., is reduced to Rs. 1,000- and there is no disposition of the balance as in A 1. As for the disposition of the house in this will the wife is to have 'during her life-time the right only to enjoy my ancestral house'. There is no disposition of the property after this life-estate and there is therefore an intestacy as to this.

Further, out of the balance the executor is directed to conduct a permanent charity in Nataraja temple. A certain manai is given to the executor, on majority to Kailasam with the garden—presumably the flower garden given to charity in the former will. There is no mention of the amount due on Varthamanam.

Thus the resemblances between the bequests in the two wills amount to this :

(i) The legacy of Rs. 5,000 to Kailasam is the same in both.

(ii) The legacies of Rs. 120, to the wife and aunt are the same, with this difference that they are directed to be paid out of interest on Rs. 3,000, in the later will, and capital is bequeathed after their lives.

(iii) The bequest of the house to the widow for life appears in both. On this state of facts what is the law :—

Williams on Executors, 10th Edition, Vol. 1 page 119 approved in many cases and also by Sir J. Hannen in *In the Goods of Petchell*¹ says, "But the mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly or in effect revoke the former, or the two be incapable of standing together; for though it be a maxim, as Swinburne says above, that 'no man can die with two testaments', yet any number of instruments, whatever be their relative date, or in whatever form they may

be (so as they be all clearly testamentary), may be admitted to probate as together containing the last will of the deceased."

Further, Lord Penzance in *Lemage v. Goodban*¹ said 'Now it was argued that in the case of more than one testamentary paper, each professing in form to be the last will of the deceased, it is necessary for the court, before concluding that they together constitute the will, to be satisfied that the testator intended them to operate together as such. In one sense this is true, for the intention of the testator in the matter is the sole guide and control. But the 'intention' to be sought and discovered, relates to the disposition of the testator's property and not to the form of his will. What dispositions did he intend?—not which, or what number, of papers did he desire or expect to be admitted to probate—is the true question."

So *Dempsey v. Lawson*² per Sir, J. Hannen. "If it can be collected from the words of the testator in the later instrument that it was his intention to dispose of his property in a different manner to that in which he disposed of it by the earlier document, the earlier document will be revoked, and this, although in some particulars the later will does not completely cover the whole subject-matter of the earlier. This is what was decided in *Plenty v. West*' (1 Roberts Eccl. 264.)

Therefore if we can collect from the terms of the later will an intention to dispose of his property in a different manner from the former will, the earlier stands revoked. The intention is to be the guide and the case last cited shows that it does not matter if the second will does not provide for the whole subject-matter of the first, *e. g.*, the intestacy as to the house referred to above. Now, there is here no express clause of revocation. What do the words 'as the wills previously executed by me have not been brought into force' mean? A very similar clause appears in A. 1. Before answering this question we may pause for a moment to consider the arguments of Mr. A. Krishnaswami Iyer that if the testator intended all his prior wills to be valid, no administration ought to go on any one paper. There is no evidence as to what happened to his prior wills—they may have been destroyed. The concubine gives evidence that these two wills were given to her. She does not speak to others. It certainly looks as if A 1 was not intended to

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2. (1865) L. R. 1 Pro & D. 57 at 62. 3. (1877) 2 P. D. at 98 page 105.

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be destroyed by the testator. We must proceed on the state of things left by the testator so far as we have them in evidence. To return to the words quoted above. They may mean merely "as a will only operates on death and I have not yet died, my wills have as yet had no operation." On the other hand, they may mean "As I have not died since I made the previous will, and consequently they have had no effect, they are to have none but the dispositions I now make are to be operative." If the latter is the proper meaning, which appeals to us, in our opinion they point very strongly to an implied revocation in words. However, it is not necessary to stand on this ground alone. The resemblances in the two wills have already been pointed out. It could hardly have been the intention of the testator that the legacies to Kailasam should be cumulative. The same applies to the legacies to the widow and aunt, and the repetition of the disposition of the life-estate in the house to the widow has no meaning or legal effect. As Sir F. Jeune. P. said in *Chichester v. Quartrefages* ¹ "It appears to me that he (testator) never could have intended that the codicils should stand together, for the purpose only of doubling such legacies as a court of construction might hold to be cumulative" In *In the Estate of Ann Faith Bryan* ² it was held that revocation must be implied from the terms of the last document as the funeral and testamentary expenses were provided for twice over (as in the case before us) and it was very doubtful if the legacies could possibly be held to be cumulative when they would amount to more than the value of the estate. The case in *Dempsey v. Lawson* ³ was quoted with approval. Here, the legacies to Kailasam if cumulative together with funeral expenses and legacies to the widow and aunt as those to the new legatees in Exh. A would amount to over Rs. 30,000, considerably over the total value of the estate. Again, it cannot be said that there is nothing inconsistent between the terms of the two wills: the resemblances show that if these are to be read together and taken as cumulative they cannot be satisfied in full from the estate. The dispositions as to the balance and the flower garden are clearly inconsistent with each other. Though the court of appeal has held that the court "will endeavour so to

1. (1895) P. 186 at 189

2. (1907) P. 125.

3. (1877) 2 P. D. 98.

read the words as to support the admissibility of both documents to probate" *Townsend v. Moore* ¹ it seems to us impossible here to do so, and moreover the words first used in the will and discussed above and the whole tenor of the second will seem to us to imply that the intention of the testator was that only the later will should be operative and the prior will should be revoked. To this extent we allow the appeal. No argument has been addressed to us to show that the learned District Judge was wrong in the order he made respecting to whom the Letters of Administration should be issued. We therefore direct Letters of Administration to issue with the second will only dated 2—1—14 annexed to 2nd, 3rd and 4th defendants on their executing the necessary security bonds within 6 weeks from this date. We think that plaintiff's costs should be paid by 1st defendant. There will be no other order as to costs.

C. A. S.

Appeal allowed in Part.

PRIVY COUNCIL.

PRESENT :—LORD ATKINSON, LORD PHILLIMORE AND SIR JOHN EDGE:

Suriesetti Butchyya and another

... *Appellants.*

v.

Raja Parthasarathy Appa Row and another *Respondents.*

Madras Estates Land Act, 1908—S 6, Sub-Sections (1) and (6)—Occupying and cultivating tenants—Middlemen—Permanent right of occupancy—Right to—Ijaradars and farmers of rent—Meaning—Rights of.

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The appellants were lessees of certain lanka lands in an estate under leases granted to them, before the Madras Estates Land Act, 1908, came into operation, by virtue of their having been the highest bidders at an auction held in respect of the said lands. The practice in the estate with reference to the said lands was that when a lease was about to expire, or had but recently expired, an auction was held and a new lease granted to the highest bidder, whether he was the old lessee or not, there being thus no continuity of occupation, and the outgoing lessee having no privilege or advantage. The lease in favour of the appellants contemplated the cultivation of the land and the raising of crops upon it by ryots, and contained no clause prohibiting sub-letting. It was also found that the appellants dealt with the lands demised as middlemen, sub-letting them to tenants who held them subject to a rent payable to their immediate landlords, occupied them and cultivated them. In a suit by the appellants for the issue of pattas in respect of the lands leased to them under S. 55 of the Estates Land Act, held, that they had not acquired a permanent right of occupancy under, and were not ryots within the meaning of S. 6, sub-S. (1) of the Act, being merely middlemen.

Quære whether, if the appellants had only sublet to occupying and cultivating sub-tenants a substantial portion of their lands, they would have been altogether

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disentitled to the relief they sought, or would only have been entitled to that relief in relation to the portion of the demised lands which they had not sublet.

The object of the Act was to improve the condition and confer new rights and privileges, especially upon the occupying cultivators of ryoti land. It would be quite opposed to its policy to confer on middlemen who sublet to occupying and cultivating tenants, rights and privileges at all resembling those conferred on occupying cultivators.

The words "ijaradar and farmer of rent" in sub-S. (6) of S. 6 of the Act are not synonymous. If ijaradars and farmers of rent are ryots at all, they are non-occupying ryots, and cannot be converted into ryots with a permanent right of occupancy.

On appeal from the High Court at Madras.

Consolidated Appeal (No. 58 of 1919) from a judgment and two decrees (April 14, 1916) of the High Court, affirming two decrees of the District Judge of Kistna at Masulipatam (April 25, 1913) affirming decrees of the Deputy Collector, Ellore, made in summary suits.

Narasimham, for the appellants.

Sir George Lowndes, K. C. and *Parikh*, for the respondents.

Degruyther, K. C. and *Kenworthy Brown*, for the respondents in the connected appeal.

The judgment of their Lordships was delivered 11th July, 1921, by

Lord
Atkinson.

Lord Atkinson. This is a consolidated appeal against two decrees, both dated April 14, 1916, of the High Court of Judicature at Madras, affirming two decrees, both dated March 30, 1914, of the Court of the District Judge of Kistna at Masulipatam, which affirmed two decrees, both dated April 25, 1913, of the Court of the Deputy Collector, Kistna District, Ellore, made in Summary Suits No. 376 and No. 377 of 1912.

Though the parties in each of these suits, as well as the property affected, are different, the questions raised for decision in both appeals are practically identical, so that the decision made in one disposes of the other.

In the first suit the first defendant who had been appointed receiver by the Court in a suit dealing with the estate of the Zamindar upon which the lanka land, the subject of the suit, are situated, by a lease bearing date March 3^d, 1908, demised to the two plaintiffs (the appellants in this appeal) and to the deceased husband of the second of the two defendants (the respondents in the appeal) a considerable tract of lanka land, over 100 acres in extent, for a term of three years from March

31, 1908, reserving thereout a cist or rent of Rs. 2,420 per annum.

Some of the provisions of this lease demand consideration. It contains a recital that, in an auction held by the lessors or on whose behalf, of course, the receiver acted, the lease had been made. The practice prevailing on this estate in reference to such lands as were demised was proved to be this : that when a lease was about to expire, or had but recently expired, an auction was held. Those who desired to become lessees of the land previously demised, bid at this auction, and the new lease was granted to the highest bidder, whether he was the old lessee or another. There was thus no custom of continuity of occupation. The outgoing lessee had no privilege or advantage. It is further recited that as the lessees had executed a muchalka in favour of the lessors agreeing to cultivate the said lanka lands under the conditions set forth in the lease, the lessors had "written and given their patta". One of these conditions was that as regards planting seeds, turfs, grass, etc., and enlarging the extent of land, the lessees were to regard all the orders the lessors had issued or might issue. Another condition was that the lessees were to continue to cultivate only 110 acres and 85 cents. A third, that if the Government should during the lease take any of the demised lands for conservance works or any other purpose, the lessees would get a remission for that land of only the average cist that might accrue with reference to the ijara cist. That in the event of the Government taking lands with crops upon them the lessees might receive compensation from the Government for loss of profits, but would not be given any compensation out of the estate funds for such crops. A fourth condition, that if within the term silts should be formed and loss be caused by erosion, the lessees must bear the loss and pay the whole cist, etc., every year, and that they were not to apply for remission on any ground whatever. Again, the lessees were to bind themselves to all the steps the lessors might take against them under the Madras Rent Recovery Act (VIII of 1865) in regard to the collection of arrears. These are distress, sale or eviction. Another condition was that the lessees were not to transfer their ijara rights to others without the lessors' consent, and again, another, that neither the lessees nor the ryot who cultivates it, nor the merchant who purchases

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it, nor anybody else, shall take the tobacco and other produce raised on the ijara lanka to other places than the ijara lanka.

It is clear from this provision that the parties contemplated the cultivation of the land and the raising of crops upon it by ryots. No clause prohibiting sub-letting is to be found in the lease.

It is further stipulated that at the conclusion of the term the lanka lands leased are to be dealt with according to the pleasure of the estate authorities without obtaining any release from the lessees, and that at the conclusion of the term, though it ends by June 30 fasli 1319, the lessees are to give up the lanka land without leaving on it any produce whatever belonging to them by the end of May of that fasli for the convenient transaction of business. Provisions so elaborate as these are scarcely such as one would expect to find in the contract of tenancy of an ordinary ryot.

The appellants contend that by the provisions of certain clauses of the Madras Estates Act of 1908, this contract of tenancy is entirely superseded; that they are relieved from the obligations imposed on them by many of the covenants of their lease; that their tenure is changed, their occupancy continued, and their rent made subject to revision. If that be so, as they contend it is, then the burden rests upon them of clearly establishing that those clauses apply to their case. The obligation of proving the negative proposition, that these clauses do not apply to their case, does not rest upon the lessor.

On December 30, 1909, a notice was, on behalf of the lessors, served upon the lessees informing them that as the term of three years ijara of the lanka lands which they held from the lessors would expire by this fasli 1319, and as they were bound to quit the lands at the end of May, 1910, according to the contract of their registered muchalika, they were required to remove by that date their things, etc., that were on the said lanka lands and to vacate the same.

To this notice the lessees, on April 18, 1910, sent a reply to the effect that they were cultivating the lands as ryots when the Madras Estates Act, 1908, came into force; that they thereby acquired under S. 6 of that statute permanent occupancy rights in the said lanka lands and would not vacate them; and, further, that they possessed the right to obtain patta of the said lands; and that if patta should not be granted to them

they would take legal proceedings. Accordingly the appellants, in pursuance of this intimation of their intention, instituted on March 14, 1911, against the respondents, the suit out of which this appeal has arisen, praying the Court to determine what was a fair and equitable rent for the holding so leased to them, and, further, to make a decree directing the respondents to grant to them a patta in the form prescribed of their said lands on proper terms and to pay their costs.

In the judgment of Napier, J., who delivered the judgment of the High Court of Madras, the following passage is to be found: "It is admitted that the lessees did not cultivate the lands themselves, but sub-leased them to cultivating tenants." From the judgment of the Deputy Collector it clearly appears that it was proved before him by the witnesses examined on behalf both of the appellants and the respondents that the appellants had sublet, at all events, a considerable portion of the demised lands to sub-tenants who cultivated them personally, paying rent therefor. In the judgment of the Judge of the District Court is to be found the following passage. "Much stress has been laid upon the fact that there were no tenants on the lands when leased to the plaintiffs. I do not see that this alters the case in the least, if the lands were leased to them under ijara tenure as I have held they were. It is in evidence the plaintiffs did not cultivate the lands at all themselves, but let them out to cultivating tenants. Even if they had cultivated some of the lands themselves, I do not think it would have altered the position as the ijara tenure was clearly understood between the parties when it was entered upon."

The above extract from the judgment of Napier, J. cannot, in their Lordships' view, be treated as merely a restatement in wider language of the conclusion at which the District Judge had arrived. It may well be that before the High Court the advocate who appeared for the present appellants, feeling it hopeless, owing to the evidence that had been given, and to the judicial opinions which had been pronounced, to contest the point further, made the admission set forth by Napier, J. The passage from the judgment of Napier, J. should, in their Lordships' view, be taken in its ordinary meaning, from which it follows that the appellants dealt with the lands demised as middlemen, subletting them to tenants who held their holdings

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subject to a rent payable to their immediate landlords; occupied them and cultivated them. The lessees claim to have a rent fixed for all the land demised to them by their leases, and to have a patta granted to them of all these lands. Their Lordships have not to determine, if the statement of Napier J. be accepted according to its ordinary meaning, whether, if the appellants had only sublet to occupying and cultivating sub-tenants a substantial portion of their lands, they would be altogether disentitled to the relief they seek, or would only be entitled to that relief in relation to the portion of the demised lands which they had no sublet, especially as this question was not raised or argued before their Lordships on the hearing of this appeal. A decision on either of them is not called for in this appeal, and their Lordships must not be taken to have formed, much less to have expressed, any opinion upon them.

It appears to their Lordships to be plain, from the provision of the first seven chapters of this statute of 1908, if not indeed from the whole of it, that the object of the Act was to improve the condition and confer new rights and privileges especially upon the occupying cultivators of ryoti land such as these lands admittedly were. It would be quite opposed to its policy to confer on middle men who sublet to occupying and cultivating tenants, rights and privileges at all resembling those conferred on occupying cultivators, and, indeed, would result in depriving the latter class of the benefits intended to be conferred upon them. It could hardly be suggested that it was the object of the statute to bring about such a result as this, that the middleman could compel his landlord to grant him a patta at a rent to be fixed by a Court and the middleman's occupying and cultivating sub-tenants should in their turn be able to compel their immediate landlord, the middleman, to grant to them pattas of their holdings at rents to be similarly fixed, and this, though the middleman was an absentee who never even visited his estate.

By S. 50 of the Act, sub-s. 1, the class of persons is described to whom the provisions of ch. 4 are to apply. By sub-s. 2 of that section, it is provided that a person of that class shall be entitled to have granted to him a patta for any current revenue. Turning back to sub-s. 1 to find the description of the class to whom the right is given, it is to be composed of

ryots with a permanent right of occupancy, and also ryots holding old waste lands under a landlord otherwise than under a lease in writing.

It is obvious the lessees in this case are not members of this latter section of the class. It is equally clear that they are not members of the first section of the class. They are not ryots with a permanent right of occupancy. It is to be observed the word is "occupancy" not "possession". An owner may in one sense be in possession of his estate by the receipt of rent from the tenants of that estate, but not occupancy.

S. 51 prescribed what the patta is to contain, and by sub-S. 2 of that section it is enacted that any stipulation in restraint of cultivation or of harvesting by a ryot, or the giving up possession of his land by an occupying ryot at any specified time, is to be void and of no effect. A provision which in itself seems to suggest that the ryot, to be entitled to have a patta granted to him, has to be a cultivator of his holding.

S. 6, sub-S. 1, defines the persons who are to be entitled to acquire the permanent right of occupancy in holdings. This definition qualifies the first section of the class mentioned in S. 50 as being entitled to apply for a patta. They are those who were ryots at the passing of the Act, and then in possession, or thereafter admitted by a landowner to possession of ryoti land not being waste land situate on the landlord's estate. It is this permanent right of occupancy which entitles the ryot to apply for the patta. S. 46 prescribes the mode by which a non-occupying ryot may acquire a permanent right of occupancy of his land, but cases falling within S. 6, Sub. Ss. 4, and 5, are expressly excluded. In the view of their Lordships the words "ijaradar and farmer of rent" occurring in this sub-section are not synonymous. They denote two classes of persons. They are not defined in the definition clause. If ijaradars and farmers of rent are ryots at all they are, as appears from S. 46, non-occupying ryots, and cannot be converted into ryots with a permanent right of occupancy.

For these several reasons their Lordships are of opinion that the appellants do not belong to the class of persons entitled to the kind of relief they seek to obtain, that the judgments appealed from were right and should be affirmed, and this appeal be dismissed; and they will humbly advise His

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Majesty accordingly. The appellants must in both appeals pay the respondents' separate costs.

Solicitor for appellants : H. S. L. Polak.

Solicitors for respondents : E. Dalgado; Douglas Grant.

Appeal dismissed.

PRIVY COUNCIL.

PRESENT :— LORD SHAW LORD PHILLIMORE AND MR. AMEER

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Subramania Mudaliar and others ... *Respondents.*

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*Hindu Law — Succession — Bandhus — Preference among atma bandhus—
Maternal uncle—Father's sister's grandson.*

Under the Mitakshara Law, the maternal uncle succeeds in preference to a son of the paternal aunt's son. Though both the claimants are *atma bandhus* the maternal uncle is preferable by reason of the fact that he and the deceased were sapindas to each other and also because he is the nearer in degree. *Muthuswami v. Muthukumaraswami* 1. approved. *Sundarammal v. Rangaswami Mudaliar* 2, *Baluswami Pandithur v. Nayana Rao* 3. disapproved.

On appeal from the High Court at Madras.

Consolidated Appeals (No. 103 of 1916) from a judgment and decree of the High Court (January 22, 1913) reversing a decree of the Subordinate Judge of Tinnevely.

Dube and *Hazra* for the appellant. The Respondents did not appear.

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The judgment of their Lordships was delivered (July 7th 1921) by Mr. Ameer Ali. The two actions which have given rise to the present consolidated appeal relate to the inheritance of one Sankaramurthi Mudaliar, a Hindu inhabitant of the Tinnevely District in the Madras Presidency, subject to the law of the Mitakshara as recognized in the Dravida Country. The question for determination is of considerable importance and their Lordships cannot help regretting that, owing to the non-appearance of the respondents, it has been heard *ex parte*. Sankaramurthi died in 1900 without leaving any male issue or a widow. Consequently, on his death his mother, Vedammal, who was alive at the time, succeeded to his estate. She held the property until her own demise in 1910. Thereupon the two

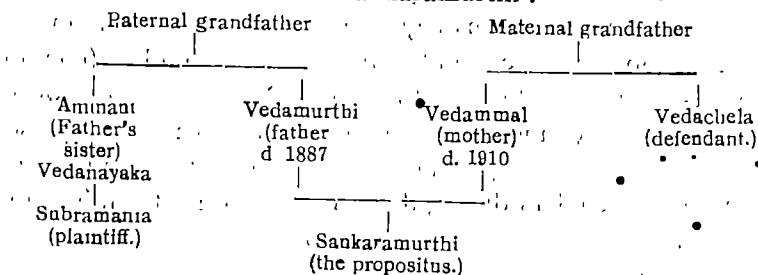
1. (1892) 1. L. R. 16 Mad 23, 30

2. (1894) 1. L. R. 18 Mad. 193;

3. (1897) 1. L. R. 20 Mad. 342.

claimants, Subramania (since deceased) and Vedachela, came forward alleging title as bandhus to Sankaramurthi's inheritance, each claiming by virtue of his relationship to be preferentially entitled.

The following table will show the position in which they stand to each other and to Sankaramurthi:—



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Subramania brought his action on January 27, 1911, in the Court of the Subordinate Judge of Tinnevely in which Vedachela was impleaded as the tenth defendant. The other defendants appear to be mainly assignees from Vedammal. Vedachala brought his suit shortly after, Subramania being the principal defendant.

The two suits were numbered respectively 6 and 15 of 1911, and were tried together before the Subordinate Judge. The primary question for him to determine was which of the two claimants—namely, the son of the paternal aunt's son or the maternal uncle was entitled to the inheritance in preference to the other. The Subordinate Judge after examining the authorities came to the conclusion that the maternal uncle, Vedachela, had the superior title. He accordingly dismissed Subramania's suit and decreed Vedachala's claim. From his decrees there were two appeals to the High Court of Madras. The learned appeal judges differed from the Subordinate Judge as to the respective rights of the parties, and accordingly reversed his decision in both the suits, the result being that Subramania's claim was allowed and Vedachela's was rejected. The present consolidated appeal before the Board is from the judgment and decrees of the High Court.

The point for determination turns on the construction of the rule laid down in the Mitakshara as to the succession of bandhus, for which the English word "cognate" has been used as a synonym in English translations and treatises on Hindu law and in a long series of judgments. The history of the law

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relating to bandhus and the principles governing their right to inherit have been explained at considerable length in the case of *Ramchandra v. Vinayak Venkatesh Kothikar* 1. It is sufficient to observe here that under the Mitakshara the right of inheritance depends on sapinda relationship, in other words, "community of blood." Sapinda relations are divided into two groups—namely, samanagotra sapindas (blood relations of the same gotra or stock) and bhinna-gotra sapindas (consanguineous relations belonging to another gotra), in other words blood relations connected through females who have passed into other families or gotras. The bhinna-gotra sapindas on whom the law confers the right of inheritance are the inheriting bandhus.

The rule in the Mitakshara (ch. II, S. 6, para. 1) as to the succession of these bandhus is rendered into English by Mr. Colebrooke in the following words: "(1) On failure of agnates, the cognates are heirs. Cognates are of three kinds; related to the person himself, to his father, or to his mother as is declared by the following text. "The sons of his own father's sister, the sons of his own mother's sister, and the sons of his maternal uncle, must be considered as his own cognate kindred. The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle, must be deemed his father's cognate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal uncles, must be reckoned his mother's cognate kindred." (2) Here, by reason of near affinity, the cognate kindred of the deceased himself, are his successors in the first instance; on failure of them, his father's cognate kindred; or, if there be none, his mother's cognate kindred. This must be understood to be the order of succession here intended."

Mr. Colebrooke's rendering of the first part of para. 1 is a paraphrase of the original terms, "atma-bandhu", "(pitri) pitru-bandhu" and "(matri) matru-bandhu". Then what follows has been judicially construed to be merely illustrative of what the three classes severally mean. It will be noticed that in the enumeration of bandhus in this illustration, several important bandhus, such as the maternal uncle and sister's son, are omitted. The maternal uncle's position as an inheriting bandhu was

established so early as the sixteenth century by Mitra Misra, whose well-known commentary on the Mitakshara named the Viramitrodaya is regarded as a high authority wherever the law of that school is in force. Mitra Misra gives first an exposition of the rule enunciated in the Mitakshara: "On failure of the samanodakas the 'cognates' or 'bandhus' are heirs. The cognates are of three descriptions; the cognates of a man himself, the cognates of the father, and the cognates of the mother. To this effect is the following passage of the Smriti: "One's father's sister's sons, one's mother's sister's sons and one's maternal uncle's sons are known to be one's own cognates; the father's father's sister's sons, the father's mother's sister's sons and the father's maternal uncle's son are known to be the father's cognates; the mother's father's sister's sons, the mother's mother's sister's sons and the mother's maternal uncle's sons are known to be the mother's cognates." Amongst these also the order is, that, by reason of greater propinquity, first one's own cognates, after them the father's cognates, and after them the mother's cognates."

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He then goes on to add: "The term bandhus in the text of Vijñaneswara and Yajñavalkya must comprehend also the maternal uncles and the rest, otherwise the maternal uncles and the rest would be omitted, and their sons would be entitled to inherit, and not they themselves, though nearer in the degree of affinity; a doctrine highly objectionable."

The Judicial Committee in *Gridhari Lall Roy v. Government of Bengal*¹ recognized the authority of the Viramitrodaya, and acting upon its exposition held that the maternal uncle, although not mentioned specifically in the illustration, was an inheriting bandhu. In that case the contest was between the father's maternal uncle and the Crown claiming the property by escheat. The Board held that as the maternal uncle was a bandhu of the deceased, the father's maternal uncle was a bandhu of the father. The maternal uncle's place, however, among the bandhus of his own class was not defined, and he has had many battles to fight in consequence.

The Subordinate Judge in the present case has held that both the claimants are no doubt atma-bandhus, but that the maternal uncle, both on the ground of nearness of blood as well as

1. (1868) 12 Moo. I A. 448.

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superior efficacy of oblations, was the preferable heir. One part of his judgment deserves notice: Referring to the decision in *Gridhari Lall Roy's case*¹ he says as follows: "Their Lordships relied on the passages quoted from the *Virāmitrodaya* in that case as well as on the passage in the *Mitakshara* dealing with the property of a trader dying abroad. The reference here is to *Vijnaneswara's* commentary on *sloka* 264, chapter 11 of *Yajñavalkya*. It occurs in the *prakaranam* (section) called *Sambooya Samuthanam* (concerns between partners). The *sloka* says that the property of a trader dying abroad goes to his (1) *dayadas*; (2) *Bandhavas*; (3) *gnatis*; (4) returning partners, and on failure of these in order, to the King. *Vijnaneswara* explains *dayadas* as "sons and the rest," *bandhavas* as 'on the mother's side the maternal uncle and the rest,' and the *gnatis* as 'gotraja sapindas as distinguished from the descendants.' It is clear from this that among the *bandhus* related through the mother, the *mathula* or maternal uncle takes the first place."

The learned judges of the High Court on appeal proceeded on a different line. Miller, J. felt himself constrained to follow certain previous decisions of his own Court in holding that the maternal uncle's claim must be overruled. Whilst his learned colleague, Sadasiva Ayyar, J. considered the passage in the *Mitakshara* laying down the order of succession among *bandhus* as "spurious" and "non-shāstraic". His view should be given in his own words: "As I pointed out in the course of the arguments, the text is illogical, incomplete and inconsistent. However, it has to be accepted though, in my opinion, it is not a *shāstraic* text, for I am bound by the authority of the Privy Council not to rely upon the more ancient and authoritative *Shāstras* where the law has been settled by the Courts according to the custom and practice of the Hindu community resident in a certain Province, even though the custom is based upon less authoritative treatises. (The mother's sister's son is unconditionally stated to come under the term 'bhinna-gotra sapinda', though very frequently he is of the same gotra as the propositus, that is, when the mother and her sister have married husbands of the same gotra). Though the *bandhus*

1. (1888) 12 Moo. I. A. 448.

are classified as atma-bandhus, pitru-bandhus and matru-bandhus, all three come in as heirs because they are bandhus of the propositus himself though the first class alone is technically called atma-bandhus (or own bandhus). With the greatest deference the fourth proposition laid down by Sir T. Muthusami Ayyar, J. ¹, viz., that between bandhus of the same class the spiritual benefit they confer on the propositus is a ground of preference, does not commend itself to me, though guarded obiter dicta to the same effect are found in other learned judgments also both earlier and later in date than *Muthusami v. Muthukumarasami* ². Some of the pitru-bandhus and matru-bandhus mentioned in the text itself confer no spiritual benefit whatever on the propositus, and I fully agree with those judicial observations which hold that according to the Mitakshara (and ignoring the Benares branch of that school) the question of spiritual benefit or of death pollution, or of the right of performance of obsequial ceremonies, should not be introduced when considering the question of heirship. I go further and say that the introduction of such questions would lead only to inextricable confusion".

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And the learned judge went on to add: "The enumeration in the Vridha Satatapa's text being clearly not exhaustive, several bandhus have been brought in by the decisions of the Courts even in precedence of the three atma-bandhus specially mentioned in the text (the said three being the father's sister's son, the mother's sister's son, and the mother's brother's son). When we once bring in others, atma-bandhus before pitru-bandhus it seems logical to hold that all atma-bandhus (lower in status to the three specially mentioned) should also be exhausted before even the first pitru-bandhu could come in. The only convenient and logical principle seems to me to so bring in all the atma-bandhus, though removed to the extreme limit of 5 degrees from the propositus before bringing in a pitru-bandhu, though the latter may be removed by a less number of degrees from the propositus and (by the same analogy) to bring in all the pitru-bandhus even up to the fifth degree before a matru-bandhu though the latter is removed by less than 5 degrees".

1. I. L. R. 16 Mad. 23, 30.

2. (1892) I. L. R. 16 Mad. 23,

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It is hardly possible for their Lordships to pronounce an opinion on the authenticity of the passage condemned in such strong terms by a Hindu Judge. They can only observe that it appears to have been accepted by a series of commentators and by eminent Hindu Judges in the British Indian Courts. Any doubt, at this stage as to its character or authority will, in their Lordships' opinion, lead only to perplexity and confusion. As regards the incompleteness of the rule, it is obvious that if the enumeration of bandhus was only intended by way of illustration the difficulty disappears, and the omission of such important bandhus as the mother's brother and the sister's son becomes easily intelligible, as both must have held in the social and religious system of the Hindus a position which did not require a jurist's pronouncement to elucidate.

Respecting the learned judge's view in the latter part of the passage quoted above, their Lordships do not consider they are called upon to express an opinion by the facts of the present case. Both the contestors are found to be atma-bandhus, and the sole question is which among the two is preferentially entitled to Sankaramurthi's inheritance. Recent writers on Hindu Law have divided each class of bandhus into two sub-classes respectively designated as cognates ex-parte paterna, and cognates ex-parte materna. This sub-division is evidently based on an inference from the order in which the several bandhus are mentioned in the illustrative enumeration. For instance, among the atma-bandhus enumerated, the name of the father's sister's son is first given; then comes the mother's sister's son; and after him, the son of the mother's brother. Similarly, among the specifically named (pitri) pitru-bandhus first comes the son of the father's paternal aunt, and among (matru) matru-bandhus the son of the mother's paternal aunt. From this it has been inferred that the expounder of the rule in question intended that each class should be divided into two sub-classes according to the side of relationship, and that in every case preference should be given to the father's side. Their Lordships, again, in the view they take of the rights of the parties in the present case, do not think it necessary to express an opinion how far this proposition is in conformity with the express rule that in each class propinquity should be the governing factor. Assuming, however, the inference to be well founded, the question arises, what is the place of the mother's

brother among the atma-bandhus? He is not specifically named; his sons are. He is unquestionably the nearest sapinda; and according to the ancient rule relating to sapinda descent, "to the nearest sapinda, the inheritance next belongs", he would undoubtedly be entitled to Sankaramurthi's estate, unless he is cut out, as the learned judges of the Madras High Court have cut him out in favour of the paternal aunt's grandson, by the inferential application of a rule of preference in each class to a person not named at all in the text, but who certainly stands nearest to the deceased by sapinda relationship.

The earlier decisions of the Madras High Court throw no light on the question at issue. In *Narasimma v. Mangaimmal* ¹, where the contest was between the mother's brother and the father's sister, preference was given to the maternal uncle. Again in *Chinnammal v. Venkatachela* ², where the contest was between the maternal grandfather of the deceased on one side and his paternal aunt on the other, the mother's father was preferred to the father's sister. In *Muthusami v. Muthukumaraswami* ³ the contest was between a maternal uncle of the half-blood and the father's paternal aunt. Muttusami Ayyar, and Parkar, JJ. held in favour of the maternal uncle, and their view was affirmed by the Judicial Committee in *Muthuswami v. Muthukumaraswami*; ⁴.

It was in the case last mentioned that the learned judges in the High Court laid down four broad principles for determining preferability among contending bandhus. (To one of these propositions Sadasiva Ayyar, J. in the present case has taken exception.) They say as follows: "The conclusions we have come to are (1) that those who are bhinna-gotra-sapindas or related through females born in or belonging to the family of the propositus are bandhus; (2) that as stated in the text of Vridha Satatapa or Baudhayana they are of three classes, *Viz.*, atma-bandhus, pitrubandhus and matru-bandhus, and succeed in the order in which they are named; (3) that the examples given therein are intended to show the mode in which nearness of affinity is to be ascertained; and (4) that as between bandhus of the same class, the spiritual benefit they confer upon the propositus is as stated in Viramitrodaya, a ground of preference."

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1. (1889) I. L. R. 13 Mad. 10

2 (1894) I. L. R. 15 Mad 421.

3. (1892) I. L. R. 16 Mad. 23.

4 (1895) L. R. 23 I. A. 83.

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In *Sundrammal v. Rangasami Mudaliar*¹ there was a triangular contest. The third defendant was the deceased's mother's sister's son, the fourth and fifth defendants were the daughters of his two sisters, whilst the plaintiffs and two other defendants were the sons of the daughter's deceased's paternal uncle. The learned judges overruled the claim of the sisters, daughters, and of the mothers, sisters, son. In rejecting the latter's claim the learned judges used the following terms. "As between plaintiffs and the third defendant the latter is a bandhu ex parte materna, whilst the former are bandhus ex parte paterna. The decision in *Muthusami v. Muthukumarasami*² is not in point. There the competition was between a maternal uncle and the father's paternal aunt's son, both of whom were bhinna-gotra sapindas and bandhus."

In *Balusami v. Narayana*³, on which the decision of the High Court mainly rests, the contest was between the deceased's maternal uncle's son on one side, and the son of his sister's son on the other. The learned judges of the High Court held that the latter was nearer in degree to the propositus than the maternal uncle's son. Among other reasons for this conclusion they state at the end of the judgment "another fundamental principle of the law, in favour of the third defendant's preferable right is that among bandhus of a class, those who are ex parte paterna take before bandhus ex parte materna."

It is to be noticed that in *Balusami v. Narayana*³, the learned judges do not exclude from consideration in determining the question of preferability the fact of superior religious efficacy. They also recognize the high authority of the Viramirodaya in the Mitakshara school.

The passage in the Mitakshara (ch. II., S. 6, paras. 1 and 2, which lays down the rules relating to the succession of bandhus, has already been quoted in a previous part of this judgment. It is expressly declared that among the classes, each takes precedence according to the order mentioned--namely, the deceased's atma-bandhus come first, the (pitri) pitru-bandhus (the father's bandhus) come next, and the (matri) matru-bandhus come last. The ground on which the rule is based is stated in express terms to be "nearness" of blood. Here, the text says,

1. (1894) I. L. R. 18 Mad. 193.

2. (1892) I. L. R. 16 Mad. 23,

3. (1896) I. L. R. 20 Mad. 342, 349.

"by reason of nearness the atma-bandhus are his successors in the first instance, and so on."

In Southern India the Smriti Chandrika of Devananda Bhatta holds a parallel position to the Mayukha in the Bombay Presidency. Devananda Bhatta flourished before Mitra Misra, the author of the Viramitrodaya, for the latter frequently quotes Devananda. Although the Smriti Chandrika in the Southern Presidency is regarded as the most authoritative commentary on Vijnaneswara's work, the Viramitrodaya holds, as in Western India, a high position. It supplements many gaps and omissions in the earlier commentaries, and illustrates and elucidates with logical preciseness the meaning of doubtful prescriptions.

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The Smriti Chandrika (ch. XI, s. 5, paras. 13-15) states the rule as to the succession of bandhus in the following terms :—"13. Brihaspati bearing in mind all the above principles declares :—'Where there are many relatives (jnatayah), or remote kindred (sakulyah) or cognate kindred (Bandhavah), whoever is nearest of kin, shall take the wealth of him, who dies without male issue ; 14. (Jnatayah) sapindas, or kinsmen connected by funeral oblations of food (sakulyah) samanodakas or distant kinsmen connected by libations of water (bandhavah) cognate kindred. A description of these is given, as follows, in a different smriti, according to their order of relationship. The sons of his own father's sister, and the sons of his own mother's sister, and the sons of his maternal uncle must be considered as his own cognate kindred. The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle, must be deemed his father's cognate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt and the sons of his mother's maternal uncle, must be reckoned his mother's cognate kindred ; 15. Of the kinsman, distant kinsmen and cognate kindred, in default of one that stands nearest in the order expressly given, he that may be somehow viewed to stand on a par with him may be selected ; it being generally declared by Gautama :—Let those take the inheritance who give the funeral cake (pinda) who are the descendants from the same gotra, or who are sprung from the same Rishi."

F. C.

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The *Sarasvati Vilasa*, according to the editor of the *Vivada Chintamani*, is another work of authority in Southern India. It frequently refers to the *Smriti Chandrika*, and, consequently, its author must have flourished later than Devananda Bhatta. In the *Sarasvati Vilasa*, the principle relating to the succession of bandhus is thus given: "595. The bhandhus are mentioned in another *Smriti* in the order of their propinquity. The sons of one's father's sister, the sons of one's mother's sister, and the sons of one's mother's brother should be known as one's atma-bandhus. The sons of one's father's father's sister, the sons of one's father's mother's sister, and the sons of one's father's mother's brother should be known as one's pitru-bandhus. The sons of one's mother's father's sister, the sons of one's mother's mother's sister, and the sons of one's mother's mother's brother should be known as matru-bandhus. 596. These have a claim upon the wealth in default of the gotrajas. 597. Even there, one's atma-bandhus take the wealth first by reason of their propinquity. In default of them the pitru-bandhus take the wealth, and in default of them, the matru-bandhus. This order should be known." Settlur's *Collection of Hindu Law Books on Inheritance*, p. 183. And then comes the passage on which the judges in *Balusami v. Narayana*¹ relied in their division of atma-bandhus in two sub-classes—namely, ex-parte paterna and ex-parte materna. That passage runs thus: 598. Nor could it be urged here that the mother being nearer than the father, the matru bandhus take the wealth before the pitru-bandhus. From the text, 'of these the mother is more important than the father'; the mother's precedence alone is stated and not that of the mother's bandhus. Therefore, we think it sound that the matru-bandhus take the wealth only after the pitru-bandhus."

A very small consideration would show that that passage has nothing to do with the members of the same class *inter se*. It only explains why pitru-bandhus are to be preferred to matru-bandhus. The mother's position being special to herself under an express rule.

The passage in the *Viramitrodaya* bearing on the subject has already been referred to, but attention may once more be

1. (1896) I. L. R. 20 M. 342, 349.

Bengal Tenancy Act (VIII of 1885)—Ss. 161, 167—*Patni Taluk—Rent Sale—Incumbrances—Meaning—Purchaser's to avoid—Onus on plaintiff—Lakhiraj land—Tenant's claim on ground of—Notice to avoid incumbrance—Bar of limitation—Absence of issue in courts below—High Court deciding against plaintiff on probabilities—Property.*

A purchaser at a rent sale of a Patni Taluk attempted to take possession of portion of the lands included in it but was resisted by tenants who claimed to hold them as revenue-free or as lakhiraj. He then served notices under S. 167 of the Bengal Tenancy Act of 1885 treating the interest which they claimed as incumbrances which he had power under the Act to avoid. They persisted in their claims and the purchaser thereupon instituted a civil suit. The only evidence adduced by him was a series of registers and thak-bust maps and thak statements in none of which the suit lands were shown to be lakhiraj, although there were instances in which other lands were mentioned as being lakhiraj. He did not show that any rent had ever been received in respect of the suit lands. There was on the other hand, a mass of evidence to show that the defendants and their predecessors had occupied the suit lands revenue free for periods greatly exceeding 12 years. *Held*, that, in the absence of any indication that the suit holdings as revenue free tenures had an origin either by creation or by the sufferance of a patnidar since 1807, the High Court was right in saying that the proper presumption was that they ran back to a period antecedent to the creation of the taluk, or to put it in another way that it lay upon the plaintiff to show an origin subsequent to the creation of the Patni Taluk if he were seeking to avail himself of S. 167 of the Act, and to annul those interests as incumbrances.

Quære, Whether an interest not directly created by the talukdar, but allowed to grow up by his sufferance and negligence is an incumbrance within the definition given to that word in S. 161 of the Act:

In this case a question arose as to whether the notices under S. 167 of the Act were invalid because they had been served within one year from the date of the sale or the date on which he first had notice of the incumbrance whichever was the later. The plaintiff did not act within one year of his having notice. No point to the contrary was made in the courts below the High Court, and no issue was taken. Nevertheless *held*, acting upon probabilities, that the plaintiff must have had notice more than a year before he acted. Their Lordships disapproved of this course of action.

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Appellants, who held a decree for mesne profits and who resided within the local limits of the jurisdiction of the court within which limits an application for the execution of the decree was to be made, executed a special power of attorney in favour of R. authorising him to, amongst other things, “execute vakalat to vakils to sign execution petitions, put in affidavits and to conduct all necessary proceedings,” R. retained a pleader to present an execution petition verified by him (R) to examine witnesses, argue, etc., An execution petition verified by R. and signed not by any of the appellants but by R and the pleader and filed in the court concerned, held to have been duly presented though R was not a “recognised agent” within the meaning of S. 37 of C. P. C. of 1882.

Under S. 36 of the Code of 1882, an application must be made or done by the party in person or by the recognised agent of the party, in person, or by the duly appointed pleader of the party in person.

Thiruvengkatasami Iyengar v. Pavadai Pillai (Viscount Haldane... 64

C. P. Code (V of 1908)—S. 9—Claim for temple honours as the first Gurikar of a caste in a village—No duties to be performed—Suit not of a civil nature.

A claim for certain temple honours to be shown to the plaintiff as the first Gurikar of a certain caste in a village, no duties having to be performed by him, is not a claim of a civil nature; and no suit for the same is maintainable in a civil court. 1 M. H. C. R. 301 : 7 Mad. 91 : 2 Bom. 476 : 10 Bom. 233 : 19 Mad. 62 : 7 L. W. 614 Ref.

Babu Pujari v. Thukra Gurikara. (Spencer and Rametam, JJ.) ... 287

—S. 11—Evidence Act, Ss. 41 to 43—Judgment in personam not Interpartes—Effect of—Whether operate as a bar of a subsequent suit—Only of evidentiary value in some cases.

It is open to a party to reassert against a third person a title which has been definitely negated in a previous suit against a contesting claimant

The present plaintiff brought a suit against two persons for a declaration that he was entitled to the office of Asari Sheriff and to recover from the government the emoluments of the office. It was held in that suit that the plaintiff did not prove title to the office and his suit was dismissed. The plaintiff then brought the present suit against the Government to recover a sum of money alleged to be due to him as the person entitled to

the office Asari sheriff and to perform the services connected therewith. In this suit the government pleaded the judgment in the former suit as a bar to the plaintiff's claim. *Held*, by the Full Bench that the former judgment does not operate as a bar to the trial of the plaintiff's claim as against the Government. 33 Mad. 483 and 36 Mad. 141 overruled; 18 C. W. N. 954 followed.

Former judgments not *inter partes* do operate as a bar to the trial of a suit though they may be received in evidence.

Distinction between judgments *in rem* and judgments *in personam* pointed out. (Wallis, C.J. and Spencer and Kumaraswami Sastri, JJ.) *Secretary of State for India v. Syed Ahmad Badsha Sahib Bahadur*. (F. B.) ... 223

—S. 11—Lessor and lessee—Decision against lessee, if binding on lessor—Surrender of the term—Arbitration—Award—Decree of court—Res-judicata.

Per Curiam: A Judgment in a suit by or against a lessee is not *res judicata* against the lessor in a subsequent suit by the latter. The lessor could not be said to be a person claiming title under the lessee within the meaning of S. 11 of the Code of Civil Procedure, notwithstanding the fact that the lessee had surrendered his terms to the lessor before its expiry. (1902) 2 K. B. 304 distinguished.

(Napier and Krishnan, JJ.) *Raja Rajeswara Sethupathi v. Ramanathaswami*. ... 288

—S. 11—Res-judicata—Incidental findings—Malabar Law—Mahomedans—Law applicable—Second appeal—Custom—Findings of fact.

In order that an incidental finding in one proceeding shall be *res-judicata* in another, it is essential that the issue in the second proceeding should have been raised and decided clearly in the first.

It may be proved as a matter of custom that the Marumakathayam law governs the devolution of the separate and exclusive property of a Moplah in Malabar. Such a custom is neither illegal nor opposed to public policy.

On a question of custom the High Court in second appeal is bound by the findings of fact of the lower appellate court but the High Court can consider whether the facts found are sufficient to support the custom.

(Oldfield and Ramesam, JJ.) *Kalandar v. Kalandar*. ... 437

—S. 11—Res-judicata—Lessor and lessee—Decision against lessor—Binding nature against lessee—Lease prior to suit against lessor—Lessee not party thereto—Effect.

A lessee under a lease granted before a suit brought by or against his lessor is not bound by the decision therein against the latter, if he (the lessee) was not himself a party to the suit.

(Oldfield and Ramesam, JJ.) *Mussan Haji v. Thavara Koran* ... 392

—S. 47—Questions relating to execution—pending a suit for possession by an auction purchaser—Infructuous application to set aside sale—Effect of.

In a suit for possession by a purchaser at a sale in execution of a mortgage decree, it is open to the defendant to plead by way of defence that the properties sought to be recovered were not included in the mortgage suit or decree but were fraudulently inserted in the sale certificates.

The mere fact that the defendant unsuccessfully applied under O. 21, Rr. 89 and 90, C. P. Code, to set aside the execution sale, does not operate as *res judicata* in the absence of any adjudication on the merits of his case in the execution proceedings.

19 M. L. J. 1 and 32 Mad. 242 Referred to.

(Ayling and Spencer, JJ.) *Munishi Chinna Dandas v. Munishi Pedda Tatiah*. ... 261

- S. 47—Suit by judgment-debtor for possession of properties alleged to have been wrongfully delivered in execution—Stranger purchaser—Suit if maintainable.

A claim by the judgment-debtor under a mortgage decree, for the recovery of properties alleged to have been wrongfully delivered in execution to the court auction purchaser, comes within S. 47 of the C. P. Code, even though the purchaser was a stranger to the mortgage suit. The remedy of the judgment-debtor is by an application under S. 47, C.P. Code, and not by a suit.

43 Mad. 107 : 38 M. L. J. 32 (F. B.) explained.

(Ayling and Krishnan, JJ.) *Jainulabidin Sahib v. Krishna Chettiar.* 120.

- Ss. 47 and 50—Execution sale—Irregularity—Nullity—Legal representative not brought on record—Mortgage suit effect on rights of puisne mortgagee.

Where a puisne mortgagee, being a party to a suit on a prior mortgage allows a decree to be passed directing the sale of the properties free of his mortgage, a sale duly and properly held in execution of the decree extinguishes the puisne mortgage and neither the puisne mortgagee nor his representatives can enforce it subsequently.

24 All. 419 Referred to.

If in the case aforesaid, the properties are sold in execution of the prior mortgagee's decree without bringing on record any body as the legal representative of the puisne mortgagee who died subsequent to the order absolute and before the sale, the execution sale does not affect the rights of puisne mortgagee. As against the legal representatives of the puisne mortgagee the execution sale is void and they can sue to enforce the mortgage without setting aside the execution sale.

Cases on the point reviewed.

(Oldfield and Ramesam, JJ.) *Raghunthaswamy Iyengar v. Gopaul*

Rao.

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- Ss. 48 and 115—Execution—Fresh application—Continuation of pending execution—Revision—Error of law—Remedy by suit open to aggrieved party.

Where owing to circumstances beyond the control of the decree holder execution proceedings are interrupted and are removed to a superior court, an application to the latter court for reliefs is not a "fresh application" for execution within the meaning of S. 48 of the Code.

21 L. C. 923 Relied on.

Where a remedy by suit is open to an aggrieved party the High Court would be very slow to interfere in revision.

32 Mad. 374 Referred to.

(Odgers, J.) *Rentala Veerarasu v. Kuruvella Subharayudu and others.*

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- S. 64—Attachment—Private alienation—Award—Effect of—Mahomedan Law—Dower—Charge—Rights of wife.

A decree on an award of arbitrators given pending an attachment is not equivalent to a private transfer within the meaning of S. 64, C. P. C., and holds good against claims enforceable under the attachment.

Under the Mahomedan law the lien in respect of unpaid dower attaches to the property of the husband in the possession of his widow or divorced wife.

A wife whose marriage is subsisting cannot claim any such lien in respect of her dower.

(Oldfield and Ramesam, JJ.) *Narayana Iyer v. Biyari Bivi.* ... 657

- S. 64 and O. 21, R. 64—Benamidar—Payment of debt to—Knowledge of benami character of the transaction—Real owner when affected—Attachment of debt—Claim—Suit by decree holder under

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O. 21, R. 63—Decree—Revival of attachment—Intermediate payments not binding on decree holder.

A payment to *benamidar* in discharge of a bond standing in his name binds the real creditor in the absence of any prohibition against such payment by the real creditor. Mere knowledge on the part of the debtor of the *benami* character of the transaction does not prevent the payment from taking effect as a valid discharge of the debtor's liability under the bond. 41 M. 435 referred to.

Where a debt is attached in execution of a decree and claim being preferred the attachment is raised, the release from attachment is only provisional and is subject to the result of the suit, if any, brought under O. 21, R. 63, C. P. Code to contest the order. If the suit succeeds the attachment is revived as from the date when it was first effected and any payments made by the debtor to his own creditor after that date, will not affect the rights of the attaching decree holder. 23 Cal. 829 followed.

(Krishnan and Odgers, JJ.) *Anihaya Hegade v. Manjaya Shetty* ... 393

—S. 92—Interest within the meaning of—Question of fact—Founders descendants—Their interest to maintain a suit under S. 92—Whether courts in a suit under S. 23 can enquire whether certain properties are trust properties—Gift of income of property to charity without limitation—Gift of property itself—Trustees denying the public character of the trust—Whether and when can be removed—Documents describing trust properties as family properties—Effect to be given to expression in *moffussil* conveyance.

Where the two plaintiffs instituting a suit under S. 92 of the Civil Procedure Code are descendants of the founder of the charity, a *chatram* and the first plaintiff is a person entitled to succeed to the family properties in a certain contingency and the 2nd plaintiff though a pleader in a different place has several houses in the place where the charity has to be conducted and frequently visits the ancestral house, held that the plaintiffs have an interest within the meaning of S. 92 of the Code of Civil Procedure.

Whether the plaintiffs instituting a suit of this character have an interest within the meaning of S. 92 or not has to be determined upon the facts of each case bearing on the relation of the plaintiffs to the charity with reference to which the suit is brought.

The fact that the plaintiffs belong to the family of the founder would naturally give them an interest in the family charity so as to enable them to bring a suit under S. 92 of the Civil Procedure Code.

41 Mad. 360 distinguished.

40 Mad. 612 followed.

Where the court is asked to frame a scheme under S. 92 of the Civil Procedure Code one of the essential enquiries to be made is what are the properties belonging to that charity; and for that purpose the court is entitled to go into the construction of the deed of endowment and other documents.

The gift of the income of a property to a charity without any limitation is a gift of the property itself. 10 Eng. Rep. 786 at page 808 and L. R. 14 Eq. 456 followed.

The mere denial by a trustee of the existence of a public trust, if bonafide, does not by itself disqualify him from being appointed or retained as the trustee of the institution.

Wherever the trustees appointed by the founder's heir persistently contended that the charity is not a public foundation at all and the property of the charity was the private property of the family and participated in violations of trust prior to their appointment, with the knowledge that the trust is a charitable trust it is a fit case for the removal of such trustees from the office by the Court.

The correct thing for a trustee of a charity desisting the charity properties is to describe the properties as belonging to the charity and to state that he is making the demise in his character as trustee. In this country the forms of conveyance are not strictly observed especially in the districts

and in judging whether properties are trust properties or private properties, courts are not justified in attaching importance to casual expressions in documents describing them as ancestral properties and in the enjoyment of the executants of the deed.

(*Abdur Rahim and Burn, JJ.*) *Venkunnatha Iyer v. S. Tygaraja Iyer.* 20

—S. 92—Scope and applicability—Hereditary trustee—Suit against hereditary co-trustees for (1) joint possession of trust properties (2) framing a scheme for enjoyment in turns, and (3) an account of trust properties in defendant's hands—Sanction under S. 92—Necessity—S. 92, Sub. S. (2)—Object and effect.

By the Full Bench:—In a suit by a hereditary trustee against his co-trustees praying *inter alia* for an account of the trust properties in their hands the plaintiff is entitled to have such an account taken, even though the suit is not instituted under S. 92 of the Code of Civil Procedure, 1908.

S. 92 governs suits for the vindication of the rights of the public in public charitable trusts and has no application to suits for the vindication of the rights of management by hereditary trustees or to disputes between such trustees *inter se* as to their turns of management.

The addition of Sub S. (2) in 1908 was intended, not to alter, but to make explicit, the law as stated in Sub. S. (1) and S. 539 of the previous Code; and the law so stated did not affect the right of a trustee, as opposed to beneficiaries to sue a co-trustee in discharge of his duty to his trust.

By *Wallis, C. J. and Krishnan, J.*:—In a suit by a hereditary trustee against his hereditary co-trustees praying for (1) joint possession of the trust properties and (2) the framing of a scheme in turns, *held*, that plaintiff was entitled to such joint possession, but that he was not entitled to have such a scheme settled except in a suit instituted under S. 92 C. P. C. of 1908

(*Sir William Ayling, O. C. J., Oldfield, Kumaraswami Sastry Ramesam and Odgers, JJ.*) *Appanna Poricha v. Narasing Poricha (F. B.)...* 608

—S. 149, O. 21 Rs. 15 and 16 and O. 22 R. 10—Construction of document—Whether transfer of part of a decree or the creation of a mere right to share in the amount that might be realised—Contract Act, S. 28—The right of a part transferee of a decree to execute the decree—His right to intervene in a pending execution application by his assignor—Civil Procedure Code, O. 22, R. 10, whether applies to execution proceedings—Order purporting to be under O. 21, R. 10, appealability of—Assignee of a decree—Application for execution by an assignee—Discretion of Court—Civil Procedure Code, O. 28 R. 16—Inherent power of Court as to procedure where there are no specific rules in the Code.

L, the son of a mortgagee decree-holder executed in favour of one M a document the preamble of which stated that L had agreed to assign to the share holder M, "one eighth share or twelve and a half per cent of the decree amount together with the securities therefor outstanding arrears of the rents and profits as standing on this day that may be realised (according to the accounts of the Taluk Office) for a consideration of 2,89,000". The document proceeded to state that in consideration of the said sum L assigned all the eighth share in the above said sum now owing on the said decree and of all other securities for the said decree amount to which L may be entitled." There were also certain conditions that execution proceedings were to be carried on in the name of L as heretofore and he was at liberty to continue the execution proceedings in E. P. No. 145 of 1905 as he may think proper and be at liberty to enter into any compromise he thought fit. If the execution proceedings resulted in a sale M was to be entitled to an eighth share of lands purchased by the decree holder himself or to an eighth share in the sale proceeds if the lands were purchased by strangers. A private sale of the property comprised in the decree was to be made on consultation with M.

*On a construction of the above terms, what is transferred is an eighth share of the decree and not simply a right to share in the amount that might be realised without the transferee having any interest in the decree itself.

The latter portion of the deed does not amount to a covenant whereby the transferee precludes himself absolutely from having anything to do with execution proceedings under all contingencies. It merely amounts to an appointment of L as the transferee's agent to realise the amount under the decree and the agency is revocable at the will of M.

If the stipulations in question have the effect of restricting M absolutely from enforcing his rights in execution as a part transferee of the decree, they are void under S 28 of the Indian Contract Act and are therefore no bar to the entertainment of an execution application by him.

Under the Code of Civil Procedure of 1908 as well as under the Code of 1882 there can be a part transfer of a decree and the transferee of a part of the decree can apply to execute the decree. He can also intervene in a pending execution application by the decree-holder if it has not been properly conducted or prosecuted by the executing decree-holder.

Where an order is made by a judge purporting to act under O. 22, R. 10, of the Code of Civil Procedure the order is appealable, as in cases properly falling under O. 22, R. 10 of the Code.

3 Madras 517 : 10 M., L. J. 305 : 28 Mad. 127 followed.

Per *The Chief Justice and Spencer J.* (*Kumaraswamy Sastri J* dissenting). The provisions of O. 22, R. 10 of the Civil Procedure Code apply to proceedings in execution.

Per *Kumaraswamy Sastri, J.* :—O. 22 R. 10 which expressly refers to assignments, creation or devolution of any interest during "the pendency of a suit" in terms excludes applications after a final decree has been passed. The word "pendency of a suit" mean the interval between the filing the plaint and the passing of a final decree.

Per *Spencer J.* A transferee decree-holder's right of execution of the decree does not depend upon the discretion of the Court. 38 Cal. 13 at page 21 followed. The discretion of the Court should be confined to laying down the conditions upon which execution should be allowed to proceed. There is no room for the exercise of the Court's discretion otherwise.

Per *Kumaraswamy Sastri, J.* Where rights are conferred by the sections of the Code and no provision is made for a particular set of facts courts ought to apply the provisions of the rules which are nearest in point with such modifications as may be necessary and not refuse relief on the ground that the legislature has not made provision for a particular case though within the generality of a section of the Code. The object of S. 151 is to give such powers to Court and to prevent failure of justice.

(*Sir John Wallis, C. J., Spencer and Kumgraswami Sastri, JJ.*)
Muthiah Chettiar v. Lodd Govinda Doss and another. ... 316

—O. 8, R. 6—Set off—Barred debt—Suit for Partition among members of joint Hindu Family.

In a suit for partition among the members of a joint Hindu Family it is not open to the defendant, a member of the family, to claim a set off in respect of a debt due to him from the joint family but the recovery of which had become barred by limitation at the date of the suit.

34 M. L. J. 32 Relied on.

(*Spencer and Ramesam, JJ.*) *Subraya Bhandary v. Janardhan Bhandary* ... 370

—O. 9, R. 18—Ex parte decree—Application to set aside—Forum—Pendency of appeal from decree—Effect of.

An application to set aside an ex parte decree must be made to the Court which passed the decree, even though an appeal against the decree by other defendants is pending in the appellate court.

C. P. Code—(Contd).

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30 Mad. 535 not followed: 32 Mad. 416 relied on.

(Sir John Wallis, C. J. and Oldfield, J.) *Palaniappa Chetty v. Subramanya Chetty*.

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—O. 20, R. 1—Posting of a notice on a notice board announcing the result of an appeal—Whether sufficient compliance with the rule—Judgment not delivered—Petition of compromise—Court should receive and pass necessary orders.

The posting of a notice on the notice board of the Court announcing the result of an appeal is not a sufficient compliance with the requirements of O. 20, Rule 1 of the Code of Civil Procedure as to the pronouncement of judgments in open Court.

30 Bom. 455 approved.

Where after the hearing of an appeal and when it is still pending for want of a delivered judgment, a petition for compromise is presented the Court has to receive the petition and pass the necessary orders thereon.

(Spencer and Ramesam, JJ) *Nagiah v. Seshamma*.

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—O. 21, R. 58—Claim petition—Order negating claim—Order dismissing petition for want of jurisdiction—Suit to set aside—Necessity—Termination of attachment followed by fresh attachment fresh claim petition, and order thereon—Effect.

On the construction of the order on a claim petition which ran as follows:—"Sale stopped. The claim cannot be investigated by this court. Petition dismissed." Held that the order did not negative the right set up by the claimant so as to necessitate the institution of a suit within one year to have it set aside.

Per Ramesam, J.:—Even if the order was one negating the claimant's right, in view of the fact that the attachment against which the claim was made had terminated, and that the decree-holder had made a fresh attachment followed by a fresh claim petition and a fresh order allowing the claim.

Semble: It was not necessary to have the order set aside within a year.

(Spencer and Ramesam, JJ) *Lakshmi Ammal v. Kadirooan Chettiar*.

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—O. 32, R. 7—Transfer of decree in favour of minor by next friend—Leave of court, if essential.

The next friend of a minor, who obtains a decree in the minor's favour, cannot transfer the decree to a third party, without obtaining the leave of court. But the requisite leave may be granted at any stage of the proceedings.

31 M. L. J. 207 followed.

40 M. L. J. 124 dissented from.

(Spencer and Ramesam, JJ.) *Kuncherla Kanakayya v. Malpuri Kottayam*.

75

—O. 34, R. 5—Decree absolute—Application for—Starting point—Appellate preliminary decree—Date of Limitation Act, Art. 181.

The starting point of limitation for an application for a decree absolute under O. 34 R. 5, C. P. C. is under Art. 181 of the Limitation Act, the date of the preliminary decree of the appellate Court, and not that of the preliminary decree of the original Court. For the purposes of such an application the appellate decree supersedes the original decree, whether the appellate Court varies the decree of the lower Court or merely affirms it.

(Sir John Wallis, C. J. and Oldfield, J.) *Jayanti Venkayya v. Damisetti Sathiraju and others*.

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—O. 34, R. 14—Simple money decree—Execution sought against property mortgaged—Mortgage unenforceable.

* Unless there is a subsisting mortgage on which a suit for sale can be brought there is no scope for the operation of O. 34, R. 14 of the Civil Procedure Code. Where therefore a mortgage is ineffective for non-compliance with statutory requirements or where it no longer subsists as a mortgage, O. 34, R. 14 of the C. P. Code will not bar a sale of the properties in execution of a money decree.

(*Spencer and Ramesam, JJ.*) *Gomathi Ammal v. Alagappa Chettiar.* ... 160

—O. 40, R. 1, S. 92—Scheme suit for temple—Receiver—Appointment pending suit—Jurisdiction—No prayer for removal of trustee—Trustee appointed by Temple Committee—Effect.

In a suit under S. 92, C. P. C. though there is no prayer to remove the trustee, the Court has power to supersede him and appoint a receiver during the pendency of the suit, notwithstanding that the trustee was appointed Manager by the Temple Committee and was only removable after regular enquiry.

(*Qadfield and Ramesam, JJ.*) *Kuppuswami Mudaliar v. Subrahmanyam Chettiar.* ... 245

—O. 41, R. 22—Death of appellant—Abatement of appeal—Whether Memorandum of cross objections, by the Respondent can be heard

Where an appeal has abated after the death of the appellant the Respondent is not entitled to have his memorandum of cross objections heard and determined. 41 Mad. 907 referred to.

(*Sir John Wallis, C. J. and Napier, J.*) *Murugappa Chettiar and another v. Ponnuswami Pillai.* ... 304

—Sch. II, paras. 15 and 16—Award—Arbitrator obtaining private information regarding merits of the case—When amounts to misconduct.

The mere fact that information regarding the merits of the dispute between the parties was in the first instance privately obtained by one of the arbitrators does not vitiate the award, if as a matter of fact that information was duly communicated to the other arbitrators and they satisfied themselves as to its truth by independent inquiry in the presence of the parties.

49 I. C. 303 : 4 A. L. J. 159 distinguished.

(*Odgers, J.*) *Sheik Mohideen Sahib v. Ramaswami Chetty.* ... 276

Civil Rules of Practice (Madras) R. 277—Applicability—"any matter connected therewith"—Meaning—High Court Circular 679 of 1869—Applicability to proviso to R. 277—Scope of—Criminal Proceedings relating to possession is within proviso.

The words "or in any matter connected therewith" in R. 277 of the Civil Rules of Practice include a subsequent suit if it is connected with the earlier one, and two suits will ordinarily be considered connected if they have any issue in common or involve substantially a determination of the same question of fact or the same mixed question of law and fact.

Per *Spencer, J.*—High Court Circular 679 of 1869 does not apply to cases in which the same parties oppose each other in successive suits. If it purported to lay down anything contrary to the rule itself we should decline to be guided by it, and cannot be availed of by a pleader merely because he has not been engaged in Criminal Proceedings relating to possession only.

(*Spencer and Ramesam, JJ.*) *Ramakrishna Pillai v. Balakrishna Iyer.* ... 60

Contract Act, (1872) S. 25, (3)—Hindu Law—Joint family—Manager—Debt, contracted for family purpose—Promissory note by junior members for, after debt had become barred—Validity—Promissory note by two or more persons—Enforceability against all co-debtors—Consideration moving to one or some of them only—Effect—Junior

Contract Act—(Contd.)

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*member of Joint Hindu family—When entitled to act as manager—
Harita's Text—Scope of.*

Per *Kumaraswami Sastri and Krishnan, JJ.* (Odgers, J. dissenting):—A debt contracted by the manager of a joint Hindu family for a joint family purpose is a debt due by the other members of the family within the meaning of S. 25 (3) of the Contract Act, and a promissory note executed by the latter undertaking to pay such debt after it had become barred is valid and binding on them.

Per *Kumaraswami Sastri and Krishnan, JJ.*:—A promissory note executed by more persons than one is enforceable against all of them, if there was consideration for the instrument as a whole. It is not necessary that consideration should move to each executant.

Per *Krishnan and Odgers, JJ.*:—Discussion of the circumstances under which a junior member of a joint Hindu family is, under the Hindu Law entitled to act as manager. Scope of the text of Harita. "But if he (eldest member) be decayed remotely absent or afflicted with disease, let the eldest son manage the affairs as he pleases" considered.

(*Kumaraswami Sastri, J.*) *Rama Pattar v. Visvanatha Pattar* ... 667
—S. 27—Exception to—Restraint of trade—Contract in—Goodwill—Sale of—Distinction—Validity.

The appellant and the respondent, who had each passenger ferry-boats on a river and who had controversies, entered into agreements, under one of which, called the kistibandi bond, executed by the respondent in favour of the appellant, the former purported to buy from the latter the goodwill of his trade in plying the ferry-boats, and every description of interest and ownership which the appellant had acquired in several river landing-places for plying the boats as well as the settlements obtained for the collection of tolls. The price was to be Rs. 5,400, payable by instalments, with interest, and if default was made, in payment of any instalment the entirety was to become due at once. No question of title was to be raised by the respondent. On or about the same date as that of the kistibandi bond, the appellant executed, in favour of the respondent a kotala agreement under which the appellant contracted that, in consideration of the Rs. 5,400, he sold his rights in the landing places and settlements and in the goodwill of the business of plying the ferry-boats, and that he cease to have any rights thereto. The respondent was to be able to enjoy and possess these rights by exercising whatever right the appellant had in them, and the latter was not to be able to make any obstacle in the respondent's enjoyment of the same. The appellant further undertook to close the business of plying the particular ferry-boats, and that if he ever carried on the business again he would return the whole amount of the consideration. Held, on a construction of the agreements, that the transaction amounted to a sale of a real goodwill and came within the exception to S. 27 of the Contract Act and was valid.

(*Viscount Haldane*) *Chandra Kanla Das v. Parasullah Mullick* (P. C.) ... 657

—S. 74—Penalty—Compound interest at the same rate on default of payment.

A stipulation to pay compound interest from the date of default at the same rate as the simple interest, is not a penalty within S. 74 of the Contract Act. 34 Cal. 160 Relied on, 37 I. C. 799 not followed.

(*Ayling and Odgers, JJ.*) *Malli Chettiar v. Veeranna Tevan*. ... 470

Court Fees Act S. VII of 1870 7 (4) (f)—Suit for partition in a joint Hindu family trade—Accounts—Valuation—Court fee.

Where in a suit for partition among the members of a joint Hindu family part of the property to be divided consists of a family trade or business the plaintiffs are at liberty to put an approximate valuation on their claim as regards the trade or business the provision of law applicable being S. 7, Cl. 4 (i) of the Court Fees Act. The plaintiffs are not bound to value that item of property in accordance with its value as afterwards ascertained in the course of the trial by the Commissioner appointed by the Court.

Court Fees Act.—(Contd)

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40 Mad 1 : 22 C. W. N. 669 Relied on.

13 L. W. 262 explained

(Oldfield J.) *Balappattabi Chetty v. Subbaraya Chetty.*

433

—**Sch. II Art 17 Cl. (6) and Sch. I—Suit for recovery of possession of immovable properties—Decree in favour of plaintiff on condition of his paying a certain amount to the defendant—Appeal by plaintiff to get rid of the condition—Valuation of appeal for the purpose of court fees.**

Where in a suit for recovery of possession of immovable properties, the plaintiff is held liable to pay a sum of money to the defendant as a condition precedent to his recovering the properties, the proper court-fee to be paid by the plaintiff for an appeal against the decree is an advalorem court fee on the amount the payment of which is made a condition precedent by the decree of the lower Court, and not a court fee of Rs. 10. The entire case law on the subject reviewed and discussed.

The value of an appeal is not in all cases the value of the suit as originally filed but the value of the relief granted by the decree which a party wishes to get rid of.

(Kumaraswami Sastri, J.) *Porkodi Achi In re.*

587

Criminal Procedure Code S. 250—Evidence showing commission of offence triable by Sessions Court—Magistrate trying the case as constituting lesser offence triable by him—Acquittal—Order for payment of compensation.

The evidence adduced in a criminal case before a Magistrate disclosed the commission of an offence triable only by the Sessions Court. But the Magistrate being of opinion that on the facts, if at all, only a lesser offence triable by him had been committed, tried the case acquitted the accused and made an order for the payment of compensation to him under S. 250 of the Cr. P. Code. *Held*, that neither the trial nor the order for payment of compensation was illegal.

24 Mad. 675 applied.

(Sir William Aylmer, O. C. J. and Krishnaswamy Rao, J.)

Venkatrayar v. Venkatrayar.

398

—**Ss. 250 (3) and 422—Award of compensation—Appeal—Notice to accused if essential.**

An accused person has no right to be heard on an appeal by the complainant against an order awarding compensation and notice of the appeal need not be given to the accused. The only person entitled to notice of such an appeal is the District Magistrate. 27 M. L. J. 629 Relied on.

(Napier, J.) *Krishna Kone V Narayana Dass.*

172

Crown Grants Act, S. 3—Grant by Crown—Determination of tenancy on six month's notice.

Where under the terms of a lease granted by the Crown the lessee agrees to surrender the demised property on six months' notice, he cannot resist a suit in ejectment by the Crown after the requisite notice, on the ground that he must be paid the value of his improvements under the Malabar Compensation for Tenant's Improvements Act.

43 Mad. 65 Ref.

(Sir John Wallis, C. J. and Krishna Rao, J.) *Ullattuthedi Choyi Secretary of State for India.*

494

Divorce Act, S. 37—Divorce—Decree for dissolution of marriage—Confirmation—Order for payment of alimony, when to be made.

S. 37 of the Indian Divorce Act does not confer on the judge an unfettered discretion as to the time within which he would make an order for payment of alimony to the divorced wife. The order for payment of alimony must be made "at" "or" within a reasonable time after the confirmation of a decree declaring the dissolution of a marriage. *Held*, therefore, that 15 years after the decree absolute was made was not a

Excess Profits Duty Act.

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reasonable time within which to apply for alimony and that the application must accordingly be refused.

(1921) P. 107 followed.

(*Sir John Wallis, C. J. and Krishan, J.*) *Arthur Malcolm Lloyd v. Kathleen Lloyd.* ... 267

Excess Profits Duty Act 1919—*Act does not require duty should be assessed within the year for which it is imposed—Provisions of the various Acts compared and discussed—Scope of S. 19—Excess Duty Act.*

The Excess Profits Duty Act 1919 does not require that the Excess profits duty should be assessed within the year for which the duty is imposed.

The provisions of the various income-tax Acts compared and discussed.

S. 19 of the Excess Profits Duty Act only provides, for the protection of the tax payer, that the profits of the business shall not be chargeable both with super-tax and excess profits duty but with whichever is higher. It has no application to a case in which profits are chargeable only with excess profits duty and not with supertax.

(*Wallis, C. J. and Krishnan, J.*) *The Deputy Commissioner of Income-tax v. Lakshmi Dass Putusholham.* ... 189

Evidence Act S. 90—*Document over 30 years old—Genuineness—Presumption—Discretion as to—Exercise of—Principles—Discretion of Court below—Interference in appeal—Grounds.*

The presumption under S. 90 of the Evidence Act as to documents over 30 years old has to be made with some care. In the case of registered documents such a presumption is very readily raised, and in the case of other documents, unless by reason of their appearance or by reason of internal evidence there are some cogent considerations which recommend them to the favour of the Court, the Court is not bound to raise such a presumption usually. The discretion of the lower Court as to the raising of the presumption ought not to be interfered with in appeal, unless the reasons given by it are *prima facie* unsound.

Their Lordships declined to interfere with the discretion of the Courts below in refusing to presume the genuineness of the alleged counter-part of a mortgage deed, though the Lower Appellate Court had made certain erroneous observations in its judgment.

(*Sadasiva Aiyar and Spencer, JJ.*) *Vaidynathaswamy Iyer v. Natesan Malavarayan and others.* ... 310

—**S. 91**—*Mortgage by deposit of title deeds—Evidence of—Letter relied upon as evidence held to be a simple mortgage by itself and to be inadmissible because unregistered—Other evidence—Admissibility—Transfer of rights under mortgage by deposit of title deeds—Mortgage by pro-note and deposit—Registered transfer of mortgage rights—Necessity—Mere indorsement of pro-note—Sufficiency.*

Where a document relied upon as evidencing a prior mortgage by deposit of title deeds is held to constitute a simple mortgage by itself, and being unregistered, to be inadmissible in evidence under S. 49 of the Registration Act other evidence is admissible to prove the terms of the equitable mortgage, and S 91 of the Evidence Act is no bar to the reception of such evidence.

An indorsee for value of a negotiable instrument the amount of which had been secured by a mortgage by deposit of title deeds does not get any right to the mortgage in his indorsee's favour by the mere indorsement of the mortgage rights.

(*Nabier and Krishnan, JJ.*) *Elumalai Chetty v. P. Balakrishna Mudaliar.* ... 297

—**S. 92**—*Absolute unconditional written promise—Contemporaneous agreement having the effect of converting it into a conditional defeasible one—Oral evidence of—Admissibility.*

The appellants contracted to purchase from the Respondents 50 bales of yarn manufactured by the Madura Mills and actually took delivery of 6 bales. Owing to a fall in prices in the market the appellants were unwilling to receive the remaining 44 bales on the terms agreed upon. The contract was thereupon cancelled on the condition that appellant paid Rs. 5,000 to the respondents to make good their losses upon their contract with the Mills. These Rs. 5,000 were included in a larger sum of Rs. 10,800 which represented the aggregate amount found to be owing by the appellants to the respondents' on a settlement of accounts, and an unconditional promise to pay Rs. 10,800 to respondents order on demand was written in the appellants' ledger kept by the respondents and was signed by the appellant. In a suit based on the accounts, *held* that oral evidence was inadmissible of a contemporaneous agreement that, in the event of the Mills consenting to cancel their contract with the respondents, the appellants should be excused from liability to pay Rs. 5,000 to the respondents. Such an agreement would have the effect of converting the absolute unconditional promise into a conditional defeasible one.

(*Sadasiva Iyer and Spencer, JJ.*) *Doorvas Subbayya v. K. M. Subbarayulu and sons*, ... 541

—S. 108—Person not heard of for more than seven years—Presumption as to when he died.

In a case where the point of time to which death has to be referred may be placed indifferently either during the seven years or after the lapse of the seven years, (it not being necessary for the plaintiff to show that the person lived during the seven years) there is a presumption after the lapse of the seven years in favour of the death and it is for the other side to displace the presumption and the party relying on the presumption is entitled to succeed if no evidence is offered by the other side.

34 All. 36; and 6 L. W. 633 dissented from.

(*Oldfield and Ramesam, JJ.*) *Bal Narayan v. Achama Narayan* ... 295

Fiduciary relationships in India—Do not invariably involve all the duties of an English trustee—Hindu Law—Adoption—Share of adopted son among Sudras in Madras when legitimate son is subsequently born—Dattaka Chandrika, its authority.

The rules applicable to accounts between trustees and *cestuis que trustent* in England do not invariably apply to fiduciary relationships in India, e.g. to the case of a manager of a joint family who, except where misappropriation is proved, is liable to account only for what he has actually received and not for what he ought to have received.

Among Sudras in Madras the adopted son shares equally with the subsequently born Aurasa son. The rule to that effect first propounded in the Dattaka Chandrika has been accepted and acted upon by the Hindu in Madras for over a century, and may now be regarded as established law.

Dictum of Turner C. J. and Muthuswami Iyer, J. in 7 Mad. 253 approved. 40 Mad. 632; 29 M. L. J. 710 overruled.

The Dattaka Chandrika has been long accepted in Southern India as a high authority on the law of adoption, but where its propositions are not based upon authentic texts it is necessary to enquire whether they have in fact been accepted, and acted upon as law.

Arumilli Perrazu v. Arumilli Subbarayadu (P. C.) ... 33

Hindu Law—Joint Family—Debts—Borrowing by junior member—Trade—Liability of other members.

Where a junior member of a joint Hindu family being in charge of a family borrows money for trading purposes the other members of the family are liable to the creditor to the extent of their shares in the family properties.

Obiter:—The actual borrower as well as the manager of the joint family would also be personally liable for the debt.

(*Oldfield and Ramesam, JJ.*) *Venkata Krishniah v. Aliyamm Subbiah* ... 554

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—*Joint Hindu family—Liability to account—Nature of—Reunion—Reuniting members bringing varying amounts—Subsequent partition—Quantum of shares.*

Although the manager of a Mitakshara Joint Hindu family is not responsible for the manner in which he disposed of the family income in the past, except in case of fraud and misappropriation, he cannot when a partition is demanded evade his liability to give an account of the assets of the family as it existed at the time of partition. The other members of the family are not bound to accept the statement of the Karta as to what the properties at the time of the partition consist of and the court can order an account of the properties to be taken.

When a partition suit is brought and it becomes necessary to decide what the joint properties are which are available for division the parties not being agreed about it the managing member will have to explain what became of the joint properties such as have been traced to his possession prior to the date of the partition to avoid an inference being drawn against him that they are still subsisting in his hands. For such a purpose he may have to give an account of what he did with such properties lest he should be debited with them at the time of the partition.

32 Mad. 271 : 43 Cal. 459 Referred to.

Per *Phillips, J.* :—In the case of a re-union in Hindu Law even though the re-uniting members bring into the common stock properties of unequal value, the re-union restores them to their original joint status and when partition is subsequently effected, they are entitled to the same shares as at the original partition irrespective of the amount of capital contributed by each co-parcener.

39 Bom. 734 followed.

33 Mad. 165 : 19 M. L. J. 723 : 23 I. C. 824 not followed.

(*Phillips and Krishnan, JJ.*) *Kristnayya v. Guruvayya* ... 503

—*Joint family—Manager—Mortgage of ancestral family property for purchase of other property—Validly against minor member—Purchase an imprudent and speculative transaction—Effect.*

Where, in a suit on a mortgage bond executed by defendants 1 and 2 and by the 3rd defendant for himself and as guardian of the 4th defendant his minor younger brother, all the defendants being members of a joint Hindu family it appeared that amount of the bond was raised for paying up a portion of the purchase money due in respect of other lands in a neighbouring village purchased by defendants 1 to 3 for their family.

Held, that the purchase was an imprudent and speculative transaction and that the mortgage of ancestral family lands for paying up a portion of the purchase money due in respect of such purchase was not binding on the 4th defendant's share in the mortgaged lands.

(*Sadasiva Iyer and Spencer, JJ.*) *Subramania Chetty v. Chudambara Mudaliar*. ... 459

—*Marriage—Brahma or Asura form—Money paid to bride's father for marriage expenses.*

Whereas, as a term of the contract of marriage, money is paid by the bridegroom to the bride's parents to enable them to meet the expenses of marriage, the marriage is one in the *asura* form.

3 M. L. J. 261 Relied on.

(*Spencer and Ramesam, JJ.*) *Ratnathanni v. Somasundara Mudaliar*. ... 76

—*Succession—Bandhus—Preference among *atma* bandhus—Maternal uncle—Father's sister's grandson.*

Under the Mitakshara Law, the maternal uncle succeeds in preference to a son of the paternal aunt's son. Though both the claimants are *atma bandhus* the maternal uncle is preferable by reason of the fact that he and the deceased were sapindas to each other and also because he is the nearer in degree.

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Muthuswami v. Mulhukumaraswami (1892) I. L. R. 16 Mad. 23 approved *Sundarammal v. Rangaswami Mudaliar* (1894) I. L. R. 18 Mad. 193. *Baluswami Pandithar v. Narayan Row* (1897) I. L. R. 20 Mad. 342. (Mr. Ameer Ali). *Vedachala Mudaliar v. Subramania Mudaliar*. 676

—*Succession—Mitakshara—Right of "Sishya" or disciple—Sudras.*

The "Sishya" or disciple of a deceased Sudra takes his property as an heir under the Mitakshara Law and prevents an escheat to the Government. The texts of Hindu Law recognising the right of inheritance of a "Sishya" or disciple are not absolute.

42 Cal. 384 (P. C.) and 12 M. 11 A. 448 Referred to.

(*Ayling and Odgers JJ.*) *Sambasiva Pillai v. Secretary of State for India*. ... 109

—*Widow—Surrender by—Validity—Test—Alienation of whole estate by successive steps—Debts of widow—Undertaking by reversioner to discharge—Effect.*

What is necessary to bring the doctrine of surrender into effect is that the widow should part with the whole of the interest; it does not matter whether it is done by one single act or by a number of successive acts.

Whether an undertaking by the reversioner to discharge the existing debts of the widow would invalidate the surrender depends upon the circumstances of each case the test to be applied being to see whether the transaction is a *bona fide* surrender or a mere devise to divide the estate with the reversioner.

(*Sir John Wallis, C. J., and Oldfield, J.*) *Sri Raja Surya Rao Bahadur Garu v. Sri Raja Suryanarayana Jagapathi Bahadur Garu* ... 208

—*Widow's estate—Movables—Waste—Alienation—Remedy of reversioner—Alienation—Limitation Act, Art. 120.*

Where the corpus of an estate inherited by a Hindu widow from her husband consists of movables and she is guilty of waste and improper alienation, it is open to the reversioner to file a suit praying that the moveable corpus may be reduced into possession and handed over to a receiver appointed in the suit. Subject to any question of limitation transference from the widow without consideration may be made to replace any part of the moveable corpus which can be traced to their lands on the equitable principle applied in (1914) A. C. 398 which imposes upon people into whose hands the property of other persons has come without consideration the duty of accounting for it and restoring it. The widow herself who is guilty of waste is accountable therefor and is bound to replace the moveable corpus which she has made away with if she is in a position to do so, subject to her right to enjoy the income of the fund replaced.

Art. 120 of the Limitation Act is applicable to a suit by the reversioner, for the reliefs aforesaid.

(*Sir John Wallis, C. J. and Krishnan, J.*) *Gogula Venkanna v. Gogula Narasimham*. ... 279

—*Will—Construction—Bequest by husband to his two wives without power of alienation with remainder in entire properties to his daughter with absolute rights—Estate conveyed—Death of one wife—Surviving widow's right to entire properties by survivorship—Rights of daughter—Pleadings—Plaint—Amendment in appeal—Practice.*

Where the will of a Hindu provided that after his death his two wives ought to take respectively the properties set out in Schedule I and II thereto and enjoy them without alienating them, and that after their death *M*, his daughter, should take the entire properties with all rights and enjoy the same, held that, on the death of one of the widows, the surviving widow became entitled to the entire properties by survivorship, as under the ordinary rule of Hindu Law, and that *M*, the daughter was entitled to the properties only after the life-time of the surviving widow.

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Where, in a suit for a declaration and injunction the plaintiff offers in the Court of first instance itself to amend his plaint by adding a prayer for possession, but that court thinks an amendment unnecessary, the Appellate Court ought not to dismiss the suit on the ground that plaintiff was out of possession at the date of suit and yet did not pray for possession. The proper order to make in such a case is to give the plaintiff leave to amend his plaint.

(Wallis, C. J. and Krishnan, J.) *Achammal v Narayanaswamy Naicken*.

3

Inam—Unenfranchised service inam land—Usufructuary mortgage of—Mortgagee in possession for over 12 years—Acquisition of a mortgagee's interest by prescription—Covenants in the usufructuary mortgage deed, binding nature of—Liability to account for rents and profits.

Where unenfranchised service inam lands are usufructuarily mortgaged and the mortgagee remains in possession for over 12 years he acquires by prescription the right of a usufructuary mortgagee and is liable to be redeemed as such.

39 Bom. 358 and 33 Bom. 116 and 4 A. C. 324. 21 Bom. 509 followed.

He is also bound by the covenants in the usufructuary mortgage and is liable to account for the rents and profits, 67 L. T. 735 and 30 M. L. J. 331. Referred to.

(Ayling and Odgers JJ.) *Sontyanagopala Dasu v. Inapatalupulu Rami*.

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Income Tax Act (VII of 1918) Ss. 3 and 33 (1)—Resident of Cochin State, having principal place of business in Cochin State and doing large part of his business in British Cochin—Profits made by his business connection in British India S. 33 (1) latter part, effect of—Whether the agent only person assessable—Non resident whether British subject or foreigner liable to income tax.

The petitioner was and resident of and had his principal place of business in Cochin State in Muttancheri which adjoins British Cochin and practically forms one town with it. He did a large part of his business in British Cochin i. e., contracts for the supply of goods were entered into and signed at the offices of firms in British Cochin and the goods were delivered at the jetties of the purchasers, the sale proceeds were paid to the firm's agent or rather duly authorised servant in cash in British India or by cheques which are cashed in banks in British India.

In these circumstances the profits and gains thus made by the petitioner are profits and gains arising to the petitioner through or from his business connection in British India and he is assessable to income tax in respect of the profits and gains under S. 33 (1) of the Income tax Act.

The latter part of S. 33 (1) first clause only provides the machinery by which the tax can be levied where the non resident himself cannot be got at and does not lay down that the profits or gains are assessable to income tax only in the name of an agent of the non resident.

Whether the nonresident is a British subject or foreigner he is liable to income tax in British India under Ss. 3 and 33 (1).

(Sir John Wallis, C. J., Ayling and Krishnan JJ.) *The Deputy Commissioner Income tax Banjee Ramjee and Co.*

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Ss. 51, 52—Scope and construction of—Specific Relief Act, S. 45—Whether and when an application for Mandamus lies against the Chief Revenue authority—Government of India Act, 1915, S. 106—Effect of on the right to apply for Mandamus—Whether Chief Revenue authority is bound to refer a question of law on the application of the assessee if it is not frivolous.

An application under S. 45 of the Specific Relief Act to direct the Chief Revenue Authority to make a reference under S. 51 of the Indian Income-tax Act 1918 does not lie in the High Court especially where the

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question raised has been considered by the Chief Revenue authority and there is no suggestion of any want of good faith on its part.

The issuing of the writ of mandamus to secure the performance of a public duty where no adequate remedy existed by action or otherwise and the substituted jurisdiction to issue orders under S. 35 of the Specific Relief Act are matters of original jurisdiction.

The High Court in making an order under S. 45 Specific Relief Act, against the Chief Revenue Authority would be exercising original jurisdiction "in a matter concerning the revenue" within the meaning of S. 106 of the Government of India Act, 1915.

S. 51 of the Indian Income-tax Act, 1918, alters to some extent S. 106 of the Government of India Act and confers jurisdiction on the High Court to proceed on a reference from a revenue authority under the provisions of the section.

An application for an order under S. 45 of the Specific Relief Act against the Chief Revenue Officer is a proceeding against him within the meaning of S. 52 of the Income-tax Act.

(1891) 2 Q. B. 46 followed.

Consequently, independently of S. 106 of the Government of India Act S. 52 of the Income tax Act prohibits among other things any application against the Chief Revenue Authority under S. 45 of the Specific Relief Act in respect of anything done by him, in good faith.

"Anything done" in S. 52 includes also anything omitted to be done.

Full effect will be given to the language employed by the legislature in S. 51 of the Income-tax Act by giving the Revenue Authority, which is entrusted with the assessment, the duty of deciding whether and to what extent it requires assistance in making the assessment.

The decisions of English Courts afford guidance in this country for the decisions of questions of law, subject to just exceptions.

Semble :—There are not sufficient grounds for holding that the effect of S. 51 of the Income-tax Act is to partially repeal S. 106 of the Government of India Act even to the limited extent of allowing the High Court to exercise original jurisdiction when there are allegations of bad faith against the Chief Revenue Authority.

(Sir John Wallis, C. J. and Oldfield, J.) *The Chief Commissioner of Income-tax v. The North Anantapur Gold Mines, Ltd.*

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Insolvency—Official Receiver—Receiver not appointed Receiver of property—Effect.—Possessory title—Suit upon—Maintainability—Adverse possession—Interruption of—Declaratory suit regarding property subject to adverse possession—Effect.

The property of a person adjudicated an insolvent under the provision of the Provincial Insolvency Act, 1907, does not *ipso facto* vest in the Official Receiver who may have been appointed for the local area in which the insolvent is residing, but it is necessary that an order should have been passed appointing a Receiver before the property would vest in the local Official Receiver. *Held* therefore, Receiver of the local area appointed under S. 19 of the Act but not appointed Receiver of the property in question was not effectual to pass title. The purchaser in such a case cannot be held to have acquired a good title from the Court merely on the strength of the fact that it directed the delivery to him of the possession of the property sold.

Where the purchaser was by order of Court put in possession of the property purchased after dispossessing another who was in possession thereof till the date of such dispossession *Held, further*, in a suit by the latter to recover possession of the property from the former, that, inasmuch as the purchaser acquired no title from his purchase, the plaintiff was entitled to recover possession from him on the strength of his (plaintiff's) possessory title.

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Quære whether, where property belonging to A in the adverse possession of B is attached by A's creditors as his property and on a claim by B thereto being allowed is made the subject of a suit under O. 21. R. 63 C. P. C. which is decided by the High Court in Second Appeal in favour of A's creditors, B's possession from the date of attachment till the date of the decree of the High Court is ineffective for the purpose of completion of title by adverse possession.

(*Abdur Rahim and Others, JJ.*) *Vythilinga Padayachi v. Ponnuswami Padayachi*.

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Land Law of Madras—Service tenures—Karnam lands, nature of title, thereto—Has the office-holder's family any rights in such lands—Enfranchisement of Inams under Inam Rules of 1859—Whether it enures for the benefit of an office-holder's family or to himself exclusively—Distinction between personal or subsistence grants and service Inams—Madras Acts 2 of 1894 and 3 of 1895—Madras Karnam Regulations of 1802 1806 and 1831—Difference between the law of the Palayam and the law of the Karnam inams.

The lands comprising the emoluments of a Karnam or village accountant in Madras are not joint family property. They are an appanage of the office, inalienable by the office-holder, and designed to be the emolument of the officer into whose hands soever the office may pass. In many cases there may be a long continuance of the office in a particular family, but there is no absolute right of hereditary succession. The Karnam is a personal appointee, and if a stranger is appointed the lands go with the appointment to the stranger selected, without being subject to any claims thereon as a family right by relatives of former holders of the office.

This was the law in Madras even before Madras Act 2 of 1894 and Madras Act 3 of 1895, which made it clear that eligibility for the appointment of Karnam is a matter personal to the appointee.

When Karnam lands are enfranchised under the Inam Rules of 1859 the enfranchisement is to the office-holder himself and does not enure for the benefit of his family.

In this respect Karnam lands, which are service Inam differ from Palayam lands, which are now merely personal Inams. When a Palayam was abolished, in so far as the duty of rendering military service was concerned, the estate was continued with all its hereditary incidents to the Palayagar like an ordinary zemindari. But in the case of Karnams the lands follow the office. (1894) I. L. R. 8 Mad. 249 (F. B.) approved. (1902) I. L. R. 26 Mad. 339 : (1907) I. L. R. 30 Mad. 434 (F. B.) overruled.

Musti Venkata Jagannadha v. Musti Veerabhadrayya (P. C.) ...

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Landlord and Tenant—Forfeiture—Denial of the landlord's title—Landlord's knowledge of denial of title prior to suit, necessary—Permanent tenure whether can be forfeited by the denial of title—Anubhavam tenure whether forfeited by the denial of landlord's title—Amendment of plaint whether can be allowed if defendants prevented from setting up limitation.

In order to forfeit a lease on the ground of denial of title by the tenant, the landlord must prove not merely that the title of the landlord was denied but that it came to his knowledge prior to the suit.

41 Mad. 629 : 34 M. L. J. 170 followed.

42 Mad. 689 at p. 599 : 36 M. L. J. 543 referred to.

A permanent lease may be forfeited by a denial of the landlord's title. 86 Cal. 1003 Referred to.

Quære : Whether an anubhavam tenure can be forfeited by a denial of the landlord's title.

Per Odgers, J.—Where the suit was originally framed as for the redemption of the kanom and an amendment of the plaint was applied for on the 6th of December 1917 seeking to amend the plaint by seeking to recover possession of the property on the ground that the defendant was the

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plaintiff's tenant and that he denied the title of the landlord in 1904 and the amendment was ordered on the 8th of February 1919 by the Lower Appellate Court, *held*, that the amendment should not have been allowed as it prevented the defendant from setting up the plea of limitation which he was otherwise entitled to do.

27 M. L. J. 25.

(Napier and Odgers, J.J.) *Sreedharan Vatia Rajah v. Kunhunn* ... 525

—*Institution of suit for rent—Recognition of tenancy—Waiver of forfeiture—Right of tenant to the value of improvements—Customary law of South Canara.*

A landlord who sues his tenant for rent cannot be heard to say that there was no valid or subsisting lease during the period for which he sues for rent. He will also be deemed to have waived any cause of forfeiture existing up to the end of the period for which he sues for rent.

4 C. B. (N. S.) 376 Referred to:

Under the Customary law of South Canara a tenant is entitled to the value of improvements effected by him on ejectment by the landlord.

24 M. L. J. 327 followed.

(Ayling and Coutts Trotter, J.J.) *Ramappa v. Abdulla Beari*. ... 127

—*Ryotwari pattadar—Suit in ejectment—Claim of occupancy right by tenants—Onus of proof.*

In a suit by Government pattadar of ryotwari lands to eject his tenant's therefrom after due notice to quit, the onus of proving the existence of a right of permanent occupancy lies heavily on the tenants setting up the right

43 Mad. 567 (P. C.) 21 M. L. J. 845 not followed.

(Sadasiva Iyer and Napier, J.J.) *Subramania Karayalain v. Siva-subramania Pillai*. ... 175

Lease—Covenant for renewal—Specific performance—Suit for—Laches—What amount to—Nature of covenant—Validity—Rule against perpetuities—T. P. Act, S. 14—Applicability.

Plaintiff had a lease of the suit land from the defendant for a period of 5 years on 6-5-03 with a clause entitling plaintiff to obtain renewals on same terms as he might require from time to time. He failed to apply for renewal in 1903, but continued in possession without ever being called upon to take renewal. In 1915 defendant obtained a decree for possession of the land inasmuch as the plaintiff had not taken out a renewal. On 4-11-16 plaintiff called upon defendant to execute a lease for 5 years with the clause for renewals, and on his failure to do so, sued for specific performance. *Held*, that plaintiff's right to enforce the agreement had not been lost by laches and that the agreement was not void as being one in violation of the rule against perpetuities.

The agreement cannot be said to be a transfer of property within the meaning of S. 14 of the T. P. Act read with S. 5 thereof. It is only a covenant to renew the option of the lessee, a covenant running with the land and not subject to any rule against perpetuities.

(Abdur Rahim and Oldfield, J.J.) *Tellicherry Pichi Naidu v. Jefferson*. ... 94

Limitation—Adverse possession—Proof—Onus—Quantum—Forest Land incapable of cultivation—Suit for, by person having title—Plea of adverse possession by defendant—Possession by plaintiff sufficient to displace plea—What amounts to.

Standing a title in "A" the alleged possession of "B" must have all the qualities of adequacy, continuity and exclusiveness which should qualify such adverse possession. But the onus of establishing these things is upon the adverse possessor. Accordingly when the holder of title proves that he too has been exercising during the currency of his title various acts of possession, then the quality of these acts even although they might have

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failed to constitute adverse possession as against another, may be abundantly sufficient to destroy that adequacy and interrupt that exclusiveness and continuity which is demanded from any person challenging by possession the title which he holds. 39 M. 617, P. C. Foll.

Forest land, very little of which is capable of, or has been subject to, cultivation, is far removed as a subject of definite possession from lands under continuous and permanent cultivation, compactly situated and capable of being remembered with identification as the lands held and occupied in articulate plots or under leases.

(Lord Shaw) *Kuthali Moothovar v. Perinatti Kunharankutty*, ... 650

Limitation Act, Ss. 4 and 14—*Suit filed after the period of limitation in a wrong court on the re-opening day—Proper court re-opening of the same day*—*Plaint subsequently returned by the wrong court for presentation to the proper court—Subsequent presentation to the proper court—Suit not in time—Scope of S. 4, Limitation Act,*

The last day for presenting the plaint in a suit was 30-12-1917 on that day the Court of the Sub-ordinate Judge of Cochin in which the plaint ought to have been presented was closed for the Christmas holidays. On the 3rd January, 1918 the date on which that court and the Court of Small Causes, Cochin, re-opened, the plaintiff presented her plaint in the Small Cause Court. The plaint was returned for presentation to the proper court on the 6th February, 1918 and the plaint was presented in the Sub Court on the 7th February, 1918. On the question whether the suit was instituted in time, held, that it was not saved by the combined operation of Ss. 4 and 14 of the Limitation Act and it was barred by time.

Although it might be possible to exclude the time between January 3rd and 6th February under S. 14 of the Limitation Act, it cannot operate to receive a claim which became time expired by the plaintiff's failure on 3rd January to institute a suit in a court of competent jurisdiction.

The operation of S. 4 of the Limitation Act cannot be invoked if the holidays precede a period which can be excluded from computation under any other section of the Limitation Act.

For this purpose, it makes no difference that the same judge presides over the Sub-Court and the Small Causes Court or even that the same ministerial officer is deputed to receive plaints on the original as the Small Cause side, because S. 33 of the Small Causes Courts Act declares that the Small Causes Courts are different Courts for the purposes of that Act and the Civil Procedure Code.

(*Spencer and Ramesam, JJ.*) *Ummathu v. Pathumma and another* ... 84

—**S. 12 (2) and (3)**—*Time taken in obtaining copy of judgment and decree—Mode of computation.*

In computing the period of limitation for filing an appeal under S. 12 of the Limitation Act the time taken in obtaining a copy of the judgment and the time taken in obtaining a copy of the decree must both be excluded except where these two periods overlap each other and where they do overlap, the time overlapped should be excluded only once.

83 Mad. 256 and 8 M. L. J. 148 relied on.

(*Spencer and Odgers, JJ.*) *Vellayanthal Bibi and others v. Koolayama Rowethan*, ... 273

—**S. 18, Arts 62 and 95**—*Suit for share of a common debt collected by a co-sharer—Limitation—Starting point—Fraud—Extension of time.*

Where a member of a Hindu family which has become divided collects a debt due to the family and keeps the amount, a suit by the other members for their share of the moneys so collected is governed by Art. 62 and not by Art. 95 of the Limitation Act.

In the absence of proof of active and fraudulent concealment from the plaintiff of his right to institute a suit when it first accrued to him S. 18 of the Limitation Act will not apply.

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6 Mad 402 and 32 Mad. 191 referred to.

(Spencer and Ramesam, JJ.) *Ratalagu Servai v. Solai Servai* ... 274

—S. 19—Acknowledgment—Validity—Essentials—English and Indian Laws—Distinction—Acknowledgment of liability—What amount to.

Where, in a suit on a promissory note, it appeared that the maker had, in the course of his examination as a witness in certain criminal proceedings, made a statement with reference to the note to the effect:—"I executed the promissory note. The contents of the promissory-note are correct," and that at the date that the note was shown to the witness, there were four endorsements of various payments, held that the statement amounted to an acknowledgment of liability subsisting at the date thereof within the meaning of S. 19 of the Limitation Act.

Observations on the distinction between the English and the Indian Law on the subject and on the effect of the decision in 33 C 1047 (P.C.).

(Napier and Odgers, JJ.) *Subbarama Iyer v. Veerabadra Pillai* ... 217

—S. 20—Part-payment of principal—Agent duly authorised to make payment—Fact of payment appearing in handwriting of agent—Meaning—Final decree for sale—Part of hypothecated property acquired under Land Acquisition Act—Compensation money paid into Court—Payment, out of same to decree-holder under order of Judge—Payment if affords fresh starting point of limitation for execution.

On 20-9-1912 a final decree for sale of the hypothecated properties was passed. Items 4 and 5 of the hypothecated properties were afterwards acquired by the Government under the Land Acquisition Act and Rs. 3,400 (compensation money) was deposited in Court for the Government on 11-8-1914 to the credit of the suit. On the very same date the said sum of Rs. 3,400 was paid out to the decree-holder on account of his decree, the judge signing a paper indicating that the amount was paid to the decree-holder in the presence of the Judge and through the court. On a fresh execution application for sale of two other hypothecated properties filed on 10-8-1917, held, that the application was not barred by limitation.

The payment of Rs. 3,400 was part payment of the principal of the decree debt, the judge, by whose order the payment was made, was an agent duly authorized by the judgment-debtor to make it, and the fact of the payment appeared in the handwriting of the Judge within S. 20 of the Limitation Act. The requirements of that section were therefore satisfied, and the decree-holder had a fresh starting point from the date of the payment.

(Sadasiva Iyer and Coultis-Trotter, JJ.) *Govinda Pillai v. Dasai Goundan* ... 423

—Art. 11—Applicability—Unsuccessful claimant—Suit by—Limitation—Claim preferred and order therein made on the basis of an attachment—No attachment in fact—Effect—C. P. C. of 1908—O. 21, R. 68—Party against whom an order is made—Meaning.

Defendants 5 to 10, who eventually obtained a decree for money against defendants 1 to 4, had, at an earlier stage in the suit, obtained a conditional order of attachment before judgment, but the attachment was never actually made. After obtaining the decree, defendants 5 to 10, in ignorance of the last mentioned fact, proceeded, as though there had been an attachment, to obtain issue of a sale proclamation. Thereupon, plaintiff, who was a hypothecatee of the properties under a hypothecation deed executed in his favour by defendants 1 to 4, equally in ignorance of the fact that no attachment had been made, claimed under O 21, R 62, C. P. C., a declaration that the sale should be subject to his rights as hypothecatee. His claim was however, disallowed with reference by the Court or the parties, to the absence of an attachment. He thereupon brought a suit, whether or not within a year from the date of the order disallowing the claim not being clear, for declaration that the sale should be subject to his mortgage right.

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That suit was withdrawn with liberty, and, more than year after the date of the order disallowing his claim, plaintiff brought another suit for recovery by sale on his mortgage.

Held, that the suit was barred under Art. 11 of the Limitation Act of 1908 whether or no there has been an attachment, if a party prefers a claim on the footing that there was an attachment, and submits the merits of his claim to the court for investigation, he is equally a person against whom an order is passed, which under O. 21 R. 63, C. P. C., will become final, if it is not displaced.

The principle applicable to such cases is that stated by Bowen L. J. in *ex parte Pratt* (12 Q. B. D. 334). Plaintiff's resort to the claim procedure was only, a selection of one of two procedures available to him, and did not result in any entire diversion of the course of procedure or constitute an attempt to give the court a jurisdiction, which it did not possess.

(*Oldfield and Ramesam, JJ.*) *Muthiah Chetty v. Palaniappa Chetty* ...

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—**Art. 11, 13, 62 and 120**—*Property of an insolvent under attachment—Application by an official Receiver praying that property may be treated as vested in himself and as not available to the attaching creditor solely—Whether application one under O. 21, Rr. 58 to 63 or O. 38, R. 8—Suit to set aside the order—Article of the Limitation Act applicable—Money paid over to the attaching decree-holder—Suit to recover amount paid over—Limitation Act, Art. 62.*

An application by an Official Receiver to the Court which had attached the property of an insolvent at the instance of a creditor praying that the property may be treated as property vested in the Official Receiver and as therefore not available to the attaching creditor to satisfy exclusively his claim under the decree, is not an application falling under the term of O. 21, Rr. 58 to 63 or under O. 38, R. 8 or S. 73 of the Code of Civil Procedure and an order on such application does not require to be set aside by a suit brought within one year thereof under Art. 11 or 13 of the Limitation Act.

7 All. 702 doubted.

Art 13 of the Limitation Act does not apply to cases of suits to set aside orders passed on miscellaneous applications in the course of execution proceedings (which are proceedings in suits).

33 All. 98 not followed.

A suit to set aside an order on the above application by the Official Receiver can be brought within six years from the date of the order under Art. 120 of the Limitation Act.

If subsequent to the Official Receiver's application the money was paid over to the attaching decree-holder, the Official Receiver is entitled to bring a suit to recover that money as money had and received by the decree-holder for the use of the Official Receiver, and the Limitation for such a suit is three years under Art. 62 of the Limitation Act.

(*Sadasiva Aiyar and Spencer, JJ.*) *BalaKrishna Menon v. Rangan Patter* ...

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—**Arts 11, 13 and 120**—*Attachment before judgment—Decree in suit order in execution—Order on claim petition filed subsequently—Limitation for a suit questioning the order.*

Property attached before judgment is not in all cases attached "in execution of a decree" within the meaning of Art. 11, Limitation Act.

Where there is an order in execution for the sale of property attached before judgment, that order proceeds on the footing that the property is to be considered as attached in execution by virtue of O. 38, R. 11 of the Code of Civil Procedure, a claim put in after that order may properly be regarded as a claim to property attached in execution of a decree within the meaning of Art. 11 of the Limitation Act. The period of limitation for a suit to set aside the claim order is one year under that article.

Cases of claim orders in cases of attachments before judgment not governed by Art. 11 fall under Art. 120 of the Limitation Act

(*Wallis, C.J., Oldfield, Spencer, Kumaraswamy Sastry, Ramesam, JJ.*) *Arunachalam Chetty v. Periasami Serrai* (F. B.) ...

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—**Arts 62, 30, 31—Indian Railways Act—(1890) S 56—Sale of goods under—Surplus proceeds of—Suit by consignor for recovery of—Limitation.**

Held, that, a suit by the consignor of goods not delivered to the consignee and sold by the Railway company in the exercise of their right under S. 53 of the Indian Railways Act for the recovery of the surplus proceeds at that sale was governed by art 62 and not by art. 30 or 31, of the Limitation Act.

A suit for the surplus sale proceeds is entirely distinct from one for compensation for the non-delivery of the goods, and the fact that the latter class of suit might have been available for the plaintiff is no reason why a suit brought for the recovery of the surplus sale proceeds should not be held to be governed by art 62.

(*Oldfield and Ramesam. JJ.*) *Tarobchand v The Madras and Southern Maharastra Railway Company Ltd.* ... 305

—**Art. 184—Meaning and applicability—"Conveyed in trust"—"Trustee"—"Valuable Consideration"—Meaning—Limitation Act—S. 10—Effect—Hindu Law Religious institution—Mutt—Property granted for general purposes of—Permanent lease by head of mutt on small quite-rent—Lease not for necessity—Validity—Suit by succeeding head to recover property—Limitation—Adverse Possession—Arts. 134, 144 of Limitation Act—Effect—Continuance of tenancy by succeeding head of mutt—Right of—Effect—Hindu and Mahomedan Religious and charitable institutions—Laws relating to—English Law—Legal conceptions of—Applicability—Mutts—Origin, development and rais on d'être of—Superior of Mutt—Position in relation to its endowment—Religious institutions—Manager of—Powers of Inam proceedings—Object of—Entry in—Inam Register as to purpose of dedication—Evidentiary value of Gifts made long before Inam proceedings—Effect**

S. 10 controls Art. 134 of the Limitation Act of 1908, and gives the clue to the meaning and applicability of that Article. It clearly shows that the Article refers to cases of specific trust and relates to property "conveyed in trust". Neither under the Hindu Law nor in the Mahomedan system is any property "conveyed" to a shebaid or a muttawalli in the case of a dedication; nor is any property vested in him. Whatever property he holds for the idol or the institution he holds as manager with certain beneficial interest regulated by custom and usage. *Prima facie* an alienation by a manager or superior by whatever name called of a Hindu or Mahomedan pious institution cannot be treated as the act of a "trustee" to whom property has been "conveyed in trust" and who by virtue thereof has the capacity vested in him which is possessed by a "trustee" in the English Law. Of course, a Hindu or Mahomedan may "convey in trust" a specific property to a particular individual for specific and definite purpose, and place himself expressly under the English law when the person to whom the legal ownership is transferred would become a trustee in the specific sense of the term "conveyed in trust" is, however hardly the right expression to apply to gifts of lands or other property for the general purposes of a Hindu religious or pious institution. There is, under the Hindu and Mahomedan Law, a distinction between a specific trust and a trust for general pious or religious purpose.

On 17th March 1891, Srinivasa, the then head of mutt, granted to the 2nd plaintiff, a permanent lease of certain lands granted for the general purposes of the institution, on a small quit rent of Rs. 2½ a year. Shortly after the grant of the lease Srinivasa died, and was succeeded by one Samudra who held the office until 1906. On his death the 26th defendant became the head. In 1902 the 2nd plaintiff sub-leased the lands to defendants 1 and 2 for a period of 10 years. During the currency of their term defendants 1 and 2 however, obtained a lease for over 17 years from the authorised agent of the 26th defendant, the head of the mutt for the time being, and continued in possession of the lands under that lease. On 5th March 1913, the 2nd plaintiff, the 3rd plaintiff, the son of the 2nd and

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the 1st plaintiff an assignee from the 2nd and 3rd plaintiffs of their right and interest in the lands, instituted a suit, *inter alia*, against defendants 1 and 2, and the 26th defendant the object of which was to eject defendants 1 and 2 who held under a title proceeding from defendant No. 26, and to upset the act of his administration on the ground of rights acquired adversely to the Mutt by lapse of time during the incumbency of Samudra. It was found that there was no justifiable necessity for the grant of the permanent lease to the 2nd plaintiff.

Held, that Srinivasa was not a "trustee" and that all his successors were not "trustees" that the lands were not granted on a "specific" trust, and that consequently plaintiffs had not acquired a good title against the Mutt under Art 134 of the 2nd schedule of the Indian Limitation Act of 1908.

Held, further that "valuable consideration" formed the essence of both S. 10 of the Limitation Act and of Art 134 of the 2nd Schedule, and that, even if the case were one of a specific trust, the rent reserved in the grant to the 2nd plaintiff could not be held to be "valuable consideration".

Held; also that the 2nd plaintiff had not acquired "a title by 12 years adverse possession under Article 144, because, (1) according to the settled law of India a Mohunt is, in the absence of justifiable necessity, incompetent to create any interest in respect of the Mutt property to endure beyond his life and the lease to the 2nd plaintiff could endure only for the grantor's (Srinivasa's) life-time, (2) it was open to Samudra, the successor, to continue the tenancy of the 2nd plaintiff during his (Samudra's) life time and, from the circumstances that Samudra permitted the plaintiff to continue in possession and received the rent during his life with the knowledge the 2nd plaintiff's tenancy ended with Srinivasa's life the proper inference was that the tenancy was so continued and consequently the possession of plaintiff never became adverse until Samudra's death and (3) even from before 1912 the lands were held by defendants 1 and 2 under a direct lease from defendant No. 26, the Matathipathi for being.

There are two systems of law in force in India, the Hindu and Mahomedan systems, both self-contained and both wholly independent of each other, and wholly independent of foreign and outside legal conceptions. In each there are well-recognised rules relating to their religious and charitable institutions. It would be a serious inroad into the rights of Hindus and Mahomedans to be governed by their laws and customs so far as they are not in conflict with the statutory laws, if the rules of the Hindu and Mahomedan laws, were to be construed with the light of legal conceptions borrowed from abroad, unless perhaps where they are absolutely, so to speak, in *pari materia*.

Vice of method of construction by analogy illustrated in the case of 27 M. 435.

A "trust" in the sense in which the expression is used in English Law, is unknown in the Hindu system, pure and simple.

Under the Hindu law the image of a deity of the Hindu pantheon is a "Juridic entity", vested with the capacity of receiving gifts and holding property. Religious institutions, known under different names are regarded as possession the same "juridic" capacity, and gifts to are made to them *continues*. In many cases in southern India colleges and monasteries under the names of Mutt were found under spiritual teachers of recognised sanctity. These men had and have ample discretion in the application of the funds of the institution, but always subject certain obligations and duties equally governed by custom and usage. When the gift is directly to an idol or a temple, the seisin to complete the gift is necessarily effected by human agency. Called by whatever name he is only the manager and custodian of the idol or the institution. In almost every case he is given the right to a part of the usufruct, the mode of enjoyment and the amount of the usufruct depending again on usage and custom. In no case was the property conveyed to or vested in him, nor is he a "trustee" in the English sense of the term although in view of the obligations and duties resting on him, he is answerable as a trustee in the general sense formal administration.

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Discussion of case—law relating to the position of the superior of a Mutt in relation to its endowment and to the powers of the manager of religious institutions generally.

The inam proceedings were instituted simply with the object of investigating titles to hold lands revenue free as belonging to valid endowments. The inam proceedings did not create any dedication. In the case of gifts made long before the inam proceedings by the Hindu Kings or chiefs who then held the country, the purpose of the dedication must be gathered from established usage and practice. Where the evidence in the case showed that an endowment was held for the general purposes of a Mutt, an entry in the Inam Register that the dedication was for a specific purposes, viz., the worship of the idol. *Held* not to avail the party relying upon it for showing that the dedication was for a specific purpose.

Sr. Vidya Varuthi Thirtha Swamikal v. Balusami Iyer (P. C.) ... 346

—**Art. 134, 141, 144 and 148—Mortgage with possession by last male owner—Transfer by mortgagor as absolute owner—Suit for redemption by reversioner—Limitation.**

R. a Hindu owning certain properties mortgaged them with possession in 1866 and died thereafter, leaving only daughters. The mortgagee sold the properties absolutely to the defendant in 1900 and gave him possession. The last surviving daughter of R. died in 1906 and in 1914 the daughter's sons of R. brought a suit for redemption and possession of the mortgaged properties.

Held, that the suit was governed by Art. 134 and not by Arts. 141, 144 or 148 of the Limitation Act and that it was barred by limitation.

Scope of Art. 141 of the Limitation Act discussed by Ramesam, J. (*Spencer and Ramesam, JJ.*) *Narayanawami Naicker v. Periaswamy Odayar.* ... 163

—**Art. 144—Service Inam—Alienation by the holder of the office—Suit by successor to recover property alienated—Limitation—Starting point—S. 28—Effect.**

Property attached to a hereditary office in a temple was sold in 1883 by the then holder of the office, and possession of the property given to the alienee. The alienor died in 1886, and was succeeded in the office by his son who held the office till 1915 and then resigned it in favour of his son, the plaintiff. In a suit instituted by the plaintiff in 1916 for a declaration of the invalidity of the alienation and for recovery of the property from the alienee *held* that the suit was barred by limitation under Article 144 of the Limitation Act.

Each successive holder of the office does not on appointment get a fresh right to sue to recover the emoluments, S. 28 of the Limitation Act will operate to extinguish not only the right of the alienor but also the right of all who claim to succeed him by virtue of an hereditary line of succession.

(*Sadasiva Aiyar and Spencer, JJ.*) *Subramania Gurukkal v. Annamkannu Ammal.* ... 460

—**Arts. 144 and 148—Mortgage—One of several co-mortgagors, redemption by—Suit by another for recovery of possession on payment of his share of the redemption amount—Article of the Limitation Act applicable**

Where one of several mortgagors redeems the whole mortgage and obtains possession a suit against him by another co-mortgagor to recover his share of the property mortgaged on payment of his share of the expenses of redemption is not governed by Article 148 of the Limitation Act, as the suit is not one to redeem a mortgage but one to recover possession of property on payment of the charge created by S. 95 of the Transfer of Property Act. 26 Bom. 500 : 41 Mad. 650 : 34 M. L. J. 528 : 46 Cal. 111 followed.

14 All. 1 not followed

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Such a suit is governed by article 144 of the Limitation Act.

(*Krishnan and Odgers, JJ.*) *Sinnannan Chetty v. Sivakami Ammal* ...

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—**Art. 182 (5)**—*Step in aid of execution—Decree for redemption—Application by a mortgagor for extension of time for depositing the redemption money into court—Whether mortgagor is entitled to ask for the sale of mortgaged property in a redemption decree.*

An application by a mortgagor for extension of time for depositing the redemption money into court in the case of a redemption decree is an application to take a step in aid of execution of the decree under Art. 182 (5) of the Limitation Act.

It makes no difference for this purpose if the application is not granted.

The nature and requisites of a step in aid of execution considered and discussed 88 Mad. 695 : 26 M. L. J. 433 referred to.

An application to take a step in aid of execution need not necessarily be one made when an execution application is pending.

Where a decree for redemption has been passed it is open to the mortgagor to execute the decree by applying for sale.

86 Mad. 82 : 21 M.L.J. 941 : 43 Mad. 835 : 39 M. L. J. 941. followed.

(*Spencer and Ramesam, JJ.*) *Sankaranarayana Pillai v. Puthiyya Veetil Thangamma and others.* ...

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—**Art. 182, Cls. (5) and (1)**—*Execution of decree—Limitation—Decree in favour of one person—Transfer of portions thereof to different persons execution application by one of the transferees as regards portion of decree transferred to him—If saves limitation as regards other transferees in regard to their portions of decree.*

Where a decree for partition of immoveables and moveables is passed in favour of one person only but is transferred to two different persons, the portion relating to immoveables being transferred to one, and that relating to moveables to the other, an application in accordance with law made by either transferee to the proper court for execution of his portion of the decree or to take some step in aid of execution of that portion enures under Art. 182, Cl. (5) of the Limitation Act for the benefit of the other transferee as regards the portion of the decree transferred to him.

The provisions of cl. (5) of Art. 182 ought not to be restricted by extending the words of the first sentence of explanation (1) of the Article to cases where the decree though passed only in favour of one person is afterwards owned by more persons than one in severalty owing to the conduct of the original decree-holder or otherwise.

(*Sadasiva Aiyar and Spencer, JJ.*) *Venkata Reddayya v. Thoram Yarkayya and others.* ...

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Limitation (Amending) Act of 1920—Applicability—Death before Act—application to bring on record legal representatives after Act—Effect—C. P. C. of 1908—O. 22, R. 9 (2)—Sufficient cause—Meaning—Slip or mistake of Counsel : and when sufficient cause—English Law—Inapplicability in India.

The Limitation Amending Act of 1920 applies to an application for bringing on record the legal representatives of a plaintiff appellant made after the Act came into force even in cases in which the death of the plaintiff took place before that date.

The rigid English rule that a mistake or slip of Counsel is not a sufficient cause for not continuing a suit inapplicable in India.

Where plaintiff's widow as the guardian of her minor sons gave instructions to bring on their names in November 1920 in ample time, and owing to the mistake of her vakil in not noticing that under a Amending Act a shorter period of limitation would be coming into force from 1st January 1921, the legal representative application was not filed within the period allowed by the Amending Act but was filed after that date and before the expiry of the period allowed by the old Act. *Held*, that the delay due to a

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slip of that kind on the part of the Vakil without any default of the client herself might be regarded as sufficient cause for excusing the delay within the meaning of O 22, R. 9 (2), C P. C.

(Sir John Wallis, C. J. and Oldfield J.) *Vaithinatha Iyer v. Govindaswami Odayar* ... 65

Madras City Police Act—S. 71, cl. XI—Applicability—Obstruction by vehicles and animals if an offence—Essentials of offence—Intention—Necessity.

Clause xi of S. 71 of the City Police Act covers a case of obstructing a thoroughfare in any manner and is not limited to obstruction caused by vehicles and animals. In the case of obstruction by vehicles and animals there is no question of intention necessary to be proved in addition to the obstruction.

(Kumaraswami Sastri, J.) *Kuppammal In re* ... 562

Madras Estates Land Act—Dry lands—Rent on—Ryot's liability for Lands left waste through his wilful neglect—Effect—Dry crops of wet lands—Wet rent for—Landlord's right to—Sufficient water available in irrigation source for raising wet crops—Effect.

A ryot is liable to pay rent on dry lands left waste through his wilful neglect.

A ryot is liable to pay wet rents at the highest neighbouring waram rent, when dry crops are raised on wet lands when there is a sufficiency of water in the irrigation source for raising wet crops.

(Spencer and Ramesam, JJ.) *Kothandarama Reddiar v. Chinna-swami Reddi.* ... 455

—**Ss. 3 (2), (5), (11) and 6—Applicability—Minor Inams—Inamdar, under, if a "landlord" and his tenants if "ryots"—Minor inam if an "estate".**

The suit lands were originally ryoti lands situated within the permanently settled zemindari of Surangi, an estate within the meaning of the Estates Land Act; they were granted by the zemindar after the permanent settlement in inam on a quit-rent payable to himself of Rs. 15 per annum. The grant included both waram. In a suit by the inamdar to declare that the defendants, tenants under him, had no occupancy rights in the suit lands.

Held by Ayling and Coutts Trotter, JJ. (Kumaraswamy Sastri J. dissenting) that, in spite of the inam grant, the lands formed part of an "estate," that the plaintiff was a "land-holder" within the meaning of the Act, and that S. 6 thereof operated to give defendants occupancy rights.

The grant in inam is a transfer from the owner within the meaning of S. 3 (5) of the Act, and plaintiff a "land-holder" because he is a person entitled to collect the rents of the whole or any portion of the estate by virtue of such transfer.

The words "such land-holder" in S. 6 mean land holder as defined in the Act.

(Ayling, Coutts Trotter and Kumaraswamy Sastri JJ) *Sri Gadadhar Das v. Suryanarayana Patnaik.* ... 97

—**Ss. 3 (3) and 189—Holding, meaning of—Suit for partition and ejectment—Jurisdiction of Civil Court.**

In a suit by plaintiff in the Civil Court for ascertainment by division of his share of the properties which he and defendant were holding in common and for ejectment of the defendant from that share, the Civil Court returned the plaint for presentation to the Revenue Court. On appeal, *held* that the suit, so far as it was one for partition, was cognizable by the Civil Court and that the plaintiff should be allowed to withdraw his prayer for ejectment and sue in the Civil Court.

An undivided share in a parcel or parcels of land is not a holding within S. 3 (3) of the Madras Estates Land Act.

(Oldfield and Ramesam, JJ.) *Ramamurthy v. Bullragu* ... 4

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—Ss. 3 (5), 77 and 189—Minor inamdar—Land in a permanently settled estate granted on favourable quit-rent—Inamdar, if a 'landholder'—Suit for rent—Jurisdiction of civil court

Where a Zemindar makes a post-settlement inam of a portion of a village with both the warams subject to the payment of a permanent and favourable quit-rent, 9th inamdar is not a "landholder" within the meaning of S 3 (5) of the Madras Estates Land Act and a suit for rent by such minor inamdar against his tenants lies in a civil Court. The initial presumption is in favour of the Civil Court having jurisdiction and the onus lies on the defendant seeking to oust its jurisdiction to substantiate his plea.

Opinions of the Chief Justice and Kumaraswami Sastri, J in 44 Mad. 677, followed in preference to that of Ayling Sadasiva Iyer and Courts Trotter, JJ.

By *Spencer J*—A mere interest in a portion of the melwarams as by payment of jodi or quit-rent without a right to collect 'rents' from the 'ryots' of the estate will not convert a 'ryot' into a 'landholder' under the Act.

(*Spencer and Odgers, JJ.*) *Bhupathiraju v. Venkataratnam* ... 512

—S. 6—Sub-Sections (1) and (6)—Occupying and cultivating tenants—Middlemen—Permanent right of occupancy—Right to Ijaradaras and farmers of rent—Meaning—Rights of.

The appellants were leases of certain lanka lands in an estate under leases granted to them, before the Madras Estates Land Act, 1908, came into operation, by virtue of their having been the highest bidders at an auction held in respect of the said lands. The practice in the estate with reference to the said lands was that when a lease was about to expire, or had but recently expired, an auction was held and a new lease granted to the highest bidder, whether he was the old lessee or not, there being thus no continuity of occupation, and the outgoing lessee having no privilege or advantage. The lease in favour of the appellants contemplated the cultivation of the land and the raising of crops upon it by ryots, and contained no clause prohibiting sub-letting. It was also found that the appellants dealt with the lands demised as middlemen, sub-letting them to tenants who held them subject to a rent payable to their immediate landlords, occupied them and cultivated them. In a suit by the appellant for the issue of pattas in respect of the lands leased to them under S. 55 of the Estates Land Act, held, that they had not acquired a permanent right of occupancy under, and were not ryots within the meaning of S. 6, Sub S. (1) of the Act, being merely middlemen.

Quære Whether, if the appellant had only sublet to occupying and cultivating sub-tenants a substantial portion of their lands, they would have been altogether disentitled to the relief they sought, or would only have been entitled to that relief in relation to the portion of the demised lands which they had not sublet.

The object of the Act was to improve the condition and confer new rights and privileges, especially upon the occupying cultivators of ryoti land. It would be quite opposed to its policy to confer on middlemen who sublet to occupying and cultivating tenants, rights and privileges at all resembling those conferred on occupying cultivators.

The words "Ijaradar and farmer of rent" in Sub-S. (6) of S. 6 of the Act are not synonymous. If Ijaradaras and farmers of rent are ryots at all, they are non-occupying ryots, and cannot be converted into ryots with a permanent right of occupancy.

(*Lord Atkinson*) *Suriseti Butchayya v. Raja Parthasarathy Appa* ... 669

—S. 13 (3)—Rent—Vanpayir rate—Implied Contract to pay—Onus and Quantum of proof—Improvements at tenants sole expense—Vanpayir crops raised with aid of—Vanpayir rent—Charge of—Legality—Conditions

Where, in a case in which a landlord charged plaintiff his ryot with the Vanpayir rate on the ground that Vanpayir crops were cultivated

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by him in Fasli 1323 (1913-14) with the aid of a well excavated by him in 1912-13 at his own expense, the evidence for the landlord was to the effect that there was an immemorial practice in the suit estate to charge Vanpayir rates, but did not show what were the circumstances under which other tenants of the estate paid such rates whether there were any improvements on their lands, whether such improvements were made by the landlord to them, while it was admitted that the plaintiff had never raised a Vanpayir crop before Fasli 1323, that he had no other land in the estate, and that Vanpayir crops could not be cultivated without the aid of wells held, that the facts and circumstances of the case were not such as to compel the courts to find an implied contract to pay Vanpayir rates and that the courts below did not commit an error of law in refusing to find such a contract.

Per Sadasiva Iyer, J. :—The Court is not bound to presume an agreement and consideration for payment of higher rent by reason of a mere usage established by long continued payment thereof.

(*Sadasiva Iyer and Spencer, JJ.*) *Rajah of Ramand v. Guanamuthu Bothagar* ... 495

—S. 40—Commutation of rent—Basis of—Kanganam—Amount of—Deduction for—Propriety—Lands in shrotriem village—Waram system, including payment of Kanganam, prevalent for a long time—Effect.

In a suit for commutation of rent in regard to lands in a shrotriem village, in which the ryots had the occupancy holdings, and for which they had paid waram including the Kanganam, for a long time held, that the lower Courts were wrong in deducting from the total outturns of the various fields 4 p. c for kanganam in order to arrive at the amount of yield on which the money rent was to be calculated.

(*Abdur Rahim and Odgers, JJ.*) *Rangaachariar v. Doraswami Reddy and other* ... 332

Madras Hereditary Village Officers Act (III of 1895) Ss. 3 (4) 13 and 14—Service inam lands—Purohit service—Suit for possession—Jurisdiction—Civil Court—Enfranchisement—Adverse possession.

Ss. 13, 14 and 21 of Madras Act III of 1895 confer exclusive jurisdiction on Revenue Courts over suits for the recovery of the emoluments of hereditary offices falling under S. 3 Cl. (4) one of which is the office of village purohit in propriety estates as well as in ryotvari villages.

37 Mad. 548 ; 25 M. L. J. 42 Relied on.

S. 14 of Madras Act III of 1895 prescribes a period of three years for suits under the Act but does not extinguish the rights of persons who fail to sue in time.

21 Mad. 134 Referred.

(*Spencer and Ramesan, JJ.*) *Vanchinatha Iyer v. Rajagopala Iyer and others* ... 372

—S. 7—Village Officer—Proceedings of Revenue Divisional officer against—Charges framed in course of—Nature of proceeding departmental enquiry or Criminal Proceeding—Revision to High Court against order framing charges—Main maintainability—Government of India Act—S. 100—Regulation VI of 1831—Collector acting under—Not subject to superintendence of High Court—Penal Code—S. 171 C—Offence under—What amounts to—Civil Contempt—High Court—Order calling for records from Court below—Disobedience of Lower Court—Effect—Appellate jurisdiction—Revisional jurisdiction, if part of.

Even where the facts alleged against a Village Officer constitute a criminal offence, it is in the discretion of his superiors to proceed either by way of prosecution or by way of departmental action under S. 7 of Madras Act III of 1895.

Where a Revenue Divisional Officer framed against a Village Munsif two charges to the effect (1) that the village Munsif has told people not

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to vote at the elections, and (2) that he had made false representations as to increase of taxation and confiscation of property as a result of voting, *held*, in a revision petition filed against the order framing those charges.

(1) that the proceeding resulting in the order was a departmental inquiry under S 7 of Madras Act III of 1895, and was not a Criminal proceeding

(2) that the Revenue Divisional officer proceeding under the said section was not a court subject to the Superintendence of the High Court within the meaning of S. 107 of the Government of India Act

(3) that the collector's power of control over Village Officers under Regulation VI of 1831 was also not subject to the Superintendence of the High Court.

Semle : Neither of the charges framed by the Revenue Divisional Officer amounted to an offence under S. 171 C of the Penal Code.

On the admission of the Revision petition, the High Court called for the records under S. 115 C. P. C. but the Revenue Divisional officer refused to forward the same *Held*, that the officer was guilty of a civil contempt, despite the fact that the order calling for the records was eventually held to be wrong.

Appellate jurisdiction includes the power to interfere in revision and is not confined to cases in which the law allows a regular appeal.

(Sir William Aylmer, O. C. J. and Odgers, J.) *Chinnayya Gounder*
In re ...

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Madras High Court Rules (Original Side) — Rule 48—Written statement—Extension of time for filing—Sufficient cause—Improper refusal of vakil himself to file a statement in time or to allow another to do so—Vakil—Non-payment of stipulated fees—Remedy in case of—Refusal to act in cause or to allow another to act—Propriety.

Vakils, who are allowed to act as well as plead on the Original Side of the High Court are, as regards acting, very much in the same position as solicitors in England. Attorneys or solicitors are not entitled to refuse to go on with an action for want of funds unless they have given their clients sufficient notice of their intention to enable him to make other arrangements. *Held*, therefore that a vakil was not entitled to refuse to take a necessary step in a case, because his own fees had not been paid, and at the same time refuse his consent to the transfer of the case to another vakil.

Where, owing to the unjustifiable conduct of a vakil for the defendant in a suit in refusing himself to file a written statement on his behalf in time or to allow another vakil to do so, the defendant applied for an extension of time for filing the statement, *held further*, reversing the decision of the trial Judge, that the case was one in which the delay should be excused.

(Sir John Wallis, C. J. and Krishnan, J.) *Raja Muthu Krishna*
v. Nurse ...

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—Rr. 203 to 208—Sale of property by Official Referee—Partnership suit—Proclamation of sale omitting to specify place of sale—Irregularity—Substantial injury—Application under S. 310 A of the C. P. Code, 1882—C. P. Code, 1908, O. 21, R. 89.

Certain properties, moveable, and immoveable, were sold in one lot by public auction by the Official Referee. The proclamation of sale did not specify the place of sale but no objection to the proclamation on that ground was taken by any of the parties either before the Registrar or before the Judge in Chambers under R. 206 of the Original Side Rules. Everybody concerned understood that the sale would be held, in accordance with the usual practice, at the premises and there was a large attendance of bidders at the sale. On an application by one of the parties to set aside the sale after it had been concluded. *Held*, that there was neither material irregularity nor substantial injury to justify the setting aside the sale.

Where in a suit for dissolution of partnership, properties are sold in public auction by the Official Referee for realising the partnership

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assets, it is not competent to the parties to apply under S. 310 A of the Code, 1882 (O. 21, R. 19) to set aside the sale.

(*Sir John Wallis C. J. and Krishna, J.*) *Tuljaram Row v. Ramchandra Row* ...

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Madras Permanent Settlement Regulation (XXV of 1802)
Ss. 3 and 4 Applicability and effect — Zemindar — Permanent Settlement — Sanad — Construction — Inam lands within Zemindari — Resumption — Right of Government — Sanad granted and assessment fixed upon quite a different basis from that provided in S. 4 of Reg. 25 of 1802 — Effect — Madras Regulation XXXI of 1802 — Applicability — Land not exempt from payment of public revenue.

Pursuant to an arrangement come to between the British Government and the then holder of the Zemindary of Venkatagiri, held subject to the payment of a fixed revenue or peshcush and to the burden of military service a Sunnudi-milkiat, Istimrar was issued to the Zemindar on August 24, 1802, but made to take effect from July 12 of that year, i. e. from before the date on which Regulation XXV of 1802 was passed. The sunnud provided that, in consideration of the British Government relieving the Zemindar from the burden of military service and itself undertaking the same, "the British Government has fixed your annual contribution, including equivalent for the military service and the established peshcush for every year, at the sum of star pagodas 1,11,058, which said amount shall never be liable to change under any circumstances, and is hereby accordingly declared to be the permanent annual demand of Government on your Zemindary".

The Sannad also stated in specific terms the extent of the Zemindary. Clause 5 of the Sannad contained certain reservations of the absolute abandonment on the part of Government of all claim to enhance the consolidated peshcush, but they were not in reference to lakhiraj lands within the Zemindary. All those lands has been taken into consideration in arriving at the estimate of the commuted amount, but the Sanad contained no reference whatever to them. The other documents connected with the matter showed that the Government, represented by the Governor-in-council, on the one side, fixed a definite specific assessment on the whole Zemindary irrespective of particular assets derived from each particular of property within the estate, and that the Zemindar, on the other side, accepted that arrangement on that special understanding.

On an attempt made by Government to enforce its rights against the Zemindar in respect of the lakhiraj lands within the Zemindari, the question arose whether the Zemindar was entitled to take possession of them without any liability for the payment of additional revenue or whether the Government was entitled to the benefit of the resumption and possessed the right to assess revenue on those lands. The claim of Government was based on the grounds that under S. 4 of Madras Regulation XXV of 1802 Government has reserved its power to resume and assess Lakhiraj lands, that the Sanad granted to the Zemindar could not possibly override the express provisions of the Regulation and that the executive government had no power to convey to the grantee—namely, the Zemindar larger rights than the statute provided.

Held, that, as the Sanad to the Zemindar contained no reference to the Lakhiraj lands within his Zemindari, the provisions of S. 4 of Madras Regulation 25 of 1802 had no application in the case of his property and that the assessment fixed upon it by virtue of the arrangement adopted in 1802 was upon a basis quite different from that provided in S. 4 of the Regulation. In other words, both the assessment and the sanad are outside the Regulation under which the Government claims the right to resume the inam lands within the estate of the plaintiff and to assess them separately.

S. 3 of Madras Regulation XXV of 1802 lays down rule relative to the principles on which the provisions in the Regulations should be construed.

Madras Regulation XXXI of 1802 refers entirely to procedure appointed for the investigation of the title to hold lands exempted from the

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payment of a revenue. Here the lands which are sought to be resumed were not exempted from the payment of public revenue, the revenue which was paid on the estate included the lands in question and the Jama was assessed on the whole estate inclusive of the Lakhiraj and inam lands.

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Madras Revenue Recovery Act (II of 1864) S. 59—Revenue sale—Suit to set aside—Fraud—Limitation—Starting point.

A suit to set aside a sale for arrears of revenue brought about by fraud and collusion is governed by S 59 of Madras Act II of 1864. The suit can be brought within six months of the plaintiff having knowledge of the fraud or irregularities in the conduct of the sale 12 Mad, 168 Relied on.

(*Spencer and Ramesam, JJ.*) *Muthia Chettiar v. Karuthamada Pillai.* ... 92

Madras Survey and Boundaries Act, Madras Act IV of 1897 S. 20 Clause (3)—Tenant—Meaning of—Grantee of a rent free inam—Whether tenant within the meaning of S 30, Clause (3).

A grantee of a rent free inam in a zemindary is not a tenant within the meaning of the term in S 20, Cl (3) of the Madras Survey and Boundaries Act of 1897.

The desirability of amending the clause suggested.

Sir (William Ayling, O.C.J. Kumaraswami Sastri and Odgers, JJ.) *Rajah of Venkatagiri v. Subbiah.* ... 530

Mahomedan Law — Succession — Hereditary office—Lineal primogeniture.

Succession to a hereditary office which cannot be enjoyed by several heirs in common is by primogeniture and in the absence of evidence to the contrary by lineal primogeniture.

(*Sir John Wallis C J and Krishnan, J.*) *The Secretary of State for India v. Syed Ahmed Badsha Sahib Bhaadur.* ... 278

Malabar Law — Kanom—Redemption decree— Possession obtained by mortgagor in execution on payment of value of improvements as settled by first court—Enhancement of amount in appeal by tenant—Right of redemption not questioned in appeal—Liability of mortgagor or mesne profits between dates of obtaining possession and of payment of amount of improvements fixed in appeal—Malabar compensation for Tenants Improvements Act, S. 5—Effect.

In execution of a decree for redemption of a kanom, plaintiff obtained possession of the mortgaged properties on payment to the tenant of the value of improvements as settled by the first court. In an appeal by the tenant regarding the amount of the value of improvements was enhanced by the appellate court. On a claim by the tenant against the mortgagor for mesne profits for the period between the date of the latter obtaining possession in execution and that of his execution and that of his depositing the amount fixed by the appellate court. *Held*, that, as the mortgagor could not be said to have been wrongfully in possession during that period, he was not liable for mesne profits.

(*Abdur Rahim and Odgers, JJ.*) *Manian v. Kuthiravalthuth Raman.* ... 15

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—Sale of Tarwad property—Necessity for the sale to the extent of a substantial amount—Sale should be upheld—Purchaser when and whether can be compelled to account for application of sale proceeds or pay the price to the junior members

Where the major portion of the consideration for a sale by the Karnavan of a Malabar tarward is found to be for binding purposes, the proper course for courts to follow is to uphold the sale instead of directing it to be set aside on condition of the tarward paying the amount for which necessity is proved.

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27 M. L. J. 132 : 1 L. W. 877 : 33 I. C. 833 Followed 12 M. L. T. 264 and S. A. No 782 of 1919 distinguished.

In the absence of proof of any fraud or collusion on the part of the purchasers of tarwad property, they cannot be compelled to account for the application of the sale proceeds or to pay any part of the price twice over.

The Karnavan of the tarwad, being the person invested with the management of the moveable property of the tarwad, the other members are not entitled to demand the payment of the purchase money into their hands.

39 M. L. J. 590 Referred to.

(*Spencer and Ramesam, JJ.*) *Krishnan v. Govindan.* ...

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—*Stanomdar—Lease by—Lease for term exceeding his life time—Validity—Lease—Construction—Covenant for renewal—What amounts to*

Where a Taraga (lease) granted by a Stanomdar ran as follows :—
"I shall well improve this paramba and plant, etc., when the improvements have survived the period of decay and the coconut trees begin to bear their fruits, I shall take a taraga after fixing the rent in accordance with the local custom on an inspection of the kuzikanoms;" held, that parties intended that if the tenant made any improvement and those improvements were effective, he would be entitled to a lease for another term of 12 years from the date of the expiry of the prior lease and that the rent was to be revised in view of any larger yield from the land that might accrue and also having regard to the custom of the country with respect to such a lease.

A Stanomdar is entitled to grant a lease for a term exceeding his own life-time so as to make it binding on his successors provided the lease is such as is beneficial to the estate.

(*Abdur Rahim and Odgers, JJ.*) *Kaithal Kuttriyali v. Unman Amma.* ...

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—*Tarwad—Conversion of a member to Mahomedanism—Right to partition—Removal of Caste Disabilities Act (XXI of 1850).*

Apostasy from Hinduism does not entitle a member of a Malabar Tarwad to claim partition of the tarwad property and delivery to him of his share under Act XXI of 1850. The effect of conversion to an alien religion is not to enlarge the convert's interest in any property or to get rid of any condition or restriction to which it was originally subject.

Observations in (1912) M. W. N. 386 overruled.

(*Sir John Wallis, C. J., Spencer and Kumaraswami Sastri, JJ.*) *Paru v. Raman Nambiar.* ...

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Martial Law Ordinance II and III of 1921—Offence committed inside the Martial Law area—Arrest outside the Martial Law area—Legality of—Dismissal of an application for bail by a Magistrate sitting outside the Martial Law area—Legality of—Sub-Divisional Magistrate having powers as a summary Court under the Martial Law ordinance acting erroneously as a Martial Law Court when he should have acted under his ordinary powers—Mere irregularity—Ordinary procedure under the Criminal Procedure Code how far affected by the Martial Law Ordinance.

The petitioner was alleged to have committed offences under Ss. 121, 395, 431, 436 and 380 of the Indian Penal Code within the Martial Law area in Malabar and was arrested on the 3rd September 1921 within the limits of Palghat Municipality outside the Martial Law area and kept in the Sub-jail of Palghat; on the 6th of September, an application for bail was put in before the Sub-Divisional Magistrate of Palghat who was also empowered to act as a court of summary jurisdiction constituted by the Martial Law Ordinance and was rejected.

On an application for a writ of a *habeas corpus* to cause the person of the petitioner to be brought up before the High Court for the purpose of determining the legality of his detention, held, that the accused could be legally arrested for the offence committed inside the Martial Law area when he was at the time of arrest at a place outside it and that the rejection of the bail application by the Magistrate was proper.

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The provisions of the Code of Criminal Procedure relating to the arrest without a warrant by a Police Officer and the subsequent production before a Magistrate are not abrogated or suspended by the introduction of the Martial Law.

Per Spencer, J.—The dismissal of the application for bail by the Magistrate was legal, as the proper course to be taken by a Magistrate who has no jurisdiction is to decline jurisdiction and reject the application on that ground.

Per Kumaraswamy Sastri, J.—The order of remand in the case by the Magistrate acting under S. 167 of the Criminal Procedure Code as a Sub-Divisional Magistrate would be a proper exercise of his powers. The fact that he did not purport to act as a Sub-Divisional Magistrate is a mere irregularity and the High Court will not issue a writ of Habeas Corpus on that account.

The provisions of the Martial Law Ordinance III of 1921 make it clear that a Magistrate appointed under S. 6 cannot try offences committed outside the area or hold court outside. There is nothing in the ordinance to show that as Magistrate appointed under the Code of Criminal Procedure they cannot exercise the functions assigned to such Magistrate outside the area when the proceedings have not reached the stage of a trial but are only in the course of investigation preliminary to the offender being charged before a Magistrate. When a Divisional Magistrate is also appointed to try offences under S. 6 of the Ordinance there is nothing to prevent his exercising the ordinary powers of a Magistrate outside that area and arresting or remanding persons charged with offences inside the Martial Law area with a view to their being brought to trial inside the area or before the Special Tribunal.

(*Spencer and Kumaraswamy Sastri, JJ.*) *Kochunni Elaya Nair* ... 441

Mortgage—Prior and subsequent mortgagees—Suit by each impleading other—Decrees in, and sales in execution—Purchaser's right—First purchaser—Right of—Conflict between two decrees—Effect—C. P. C. O. 21, R. 100—Application under Order on—Appeal from—Application falling under S. 47—Effect—Procedure.

In a suit by a prior mortgagee A, against the mortgagor and a subsequent mortgagee (B), a decree for sale was passed in July 1907 with the consent of a subject to the subsequent mortgage right of B. In execution of that decree the mortgaged properties were sold and purchased by A himself on 8-11-1909. A obtained delivery of the properties in March 1920.

Subsequent to the date of the decree in A's favour B, brought a suit on his mortgage against the mortgagor and A in which the latter claimed priority over B's mortgage. A decree was passed in that suit on 23-8-10 directing the plaint property to be sold "subject to the priority of A to the extent of the amount declared due to him under his decree." In 1916 the final decree in the suit was passed and the mortgaged properties were again sold in execution thereof and purchased by B himself in October 1917. On 5-2-19 B got delivery of the properties and dispossessing A. On an application by A under O. 21, R. 100 C. P. C. for restoration of possession, held that he was entitled to possession as against B.

Per Sadasiva Aiyar, J.—If A was not bound by B's decree and A's, A's first purchase would give him the right to possession against B. But each having been impleaded in the other's suit, both are bound by both decrees, and, on the principle that, where the rights obtained under two decrees are in conflict with each other, the rights under the latter decree must prevail. A was bound by the decree in favour of B.

Per Coultis Trotter, J.—The matter arising out of an application in execution, the only question before the Court is as to the construction of the decree sought to be executed that in B's favour. Under it the equity of redemption passed to B's subject to the rights of A, as mortgagee.

Sadasiva Iyer and Coultis Trotter, JJ.—Where an application under O. 21 R. 100 is fought out between persons who were parties to the

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suit or their representatives the application falls under S. 47 C. P. C. (the order thereon is a decree within the definition of S. 2, Cl. (2), and an appeal lies therefrom.

In a matter of procedure it is advisable to follow the preponderance of authority in this Court.

Sadasiva Aiyar and Court v. Trolter, JJ.) Appa Rukmani Ammal v. Kuttuvang Narasimha Iyer. ... 54

Partition—Partial Partition—Rule against—Scope and Applicability—Co-owners or tenants-in-common and co-parceners—Distinction—Mahomedan Co-heirs—Partial partition—Suit by one of co-heirs for—Maintainability.

In the case of Mahomedans, the co-heirs are only tenants-in-common there being no joint family in the Hindu Law sense of the term. In the case of co-owners or tenants in common, the rule against partial partition is not so rigid as in the case of co-parceners, and partial partition may be allowed if there is not much inconvenience to the other shares, and if the plaintiff will otherwise be left without a remedy.

(Spencer and Ramesam, JJ.) Moidin Kutti v. Mariamumma. ... 457

Practice—Counsel cited as witness—Right to appear as counsel.

A pleader does not become incompetent to appear for one of the parties in a cause merely by reason of his being cited as a witness therein. The rule as to the exclusion of witnesses from court until they have been examined has no application to solicitors and counsel appearing to conduct the case on behalf of a party.

(Wallis, C. J. and Krishnan J.) Vemureddi v. Babureddi. ... 158

Provincial Insolvency Act V of 1920. Ss. 6 (b), 27 (1) and 53—Creditor's petition for adjudication on a transfer with intent to defeat creditors—Order of adjudication in insolvency and cancellation of the transfer—Whether the order of cancellation is rightfully made—Application for cancellation only after appointment of Receiver and by him—Creditors right arises only when the Receiver fails to move.

Where an application is made to adjudicate the debtors as insolvents on a transfer of their property with intent to defeat or delay creditors and the Court made the order of adjudication and ordered the cancellation of the transfer made by the same order held that the court ought not to have ordered the cancellation of the transfer made at that stage.

A proceeding to set aside a transfer in insolvency should be taken in the name of the Receiver and it is only when the Receiver fails to move in the matter that a creditor may do so.

2 Pat L J 101, 42 I C 845. 52 I C. 188 followed.

(Sir William Aylmer Q. C. J. and Odgers J.) Appa Reddi v. Chinna Appa Reddi. ... 606

S. 22—District Court—Jurisdiction—Purchaser at sale by official Receiver—Application for his bid being accepted and for declaring sale to another to be invalid—Maintainability—Regular suit Necessity.

Under S. 22 of the Provincial Insolvency Act the District Court has jurisdiction to deal with an application by the purchaser of the property of an insolvent at a sale held by the Official Receiver to the effect that his bid might be accepted and that the sale to another person be held to be invalid. A regular suit by such purchaser for the purpose is not necessary.

(Abdur Rahim and Sadasiva Aiyar, JJ.) Ramalingam Pillai v Official Receiver, Trichinopoly. ... 211

S. 78—Discretion given by—Applicability—Application under old Act (III of 1907)—Pendency of. at date of new Act—Effect.

An application by a creditor under the Provincial Insolvency Act, 1907, to adjudicate the debtor as an insolvent was held rightly dismissed by

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the Lower Court because the application was made more than 3 months after the date of the commission of the act of Insolvency.

The fact that such an application was pending when the new Act (V of 1920) came into force cannot make it one under the new act so as to make S 78 of the New Act applicable to it.

The discretion given to the court by S 78 of the new Act cannot be extended to applications made under the old Act.

(*Sadasiva Iyer and Napier, JJ.*) *Hannumayya v. Rammayya.* ... 126

Railways Act IX of 1890. S. 75 and Schedule II (m) and (s)—Shawl within the meaning of schedule—Whether should be of special value—Liability of Railway administration as carrier—“Special value” in S. 75, marginal note, in the second schedule, effect of.

Where the plaintiff sues a Railway Company for the loss of shawls given to them for being carried, it is immaterial that the particular shawls which were lost were not Cashmir Shawls nor made of wool nor articles of comparatively high value, provided that the value of the articles in the parcel exceeded Rs. 100 in all and they were shawls.

The use of the words “special value” in the marginal note to S. 75 and Cl. (s) of the second schedule does not imply that only articles falling within the descriptions of the schedule which are of exceptional value must be declared under S. 75 of the Indian Railways Act.

42 All. 76 and 39 Cal. 1029 followed.

(*Spencer and Ramesam, JJ.*) *G. I. P. Ry Co. v. Chellaram Grandhand* ... 603

Registration Act—S. 17 (3)—Will—Authority to adopt not conferred by will—Deed, construction—Registration—Necessity.

Where a document executed by a Hindu family of his wife and called a will in the body of it, after reciting that the executant had been laid up with severe bodily illness for some months past, that he consequently had had serious misgivings, and that he had not till then been blessed with an heir apparent, provided “I have consented to your adopting a son at your pleasure and conducting the management of the estate in the best manner. None of my heirs shall have cause to raise disputes touching this matter. Held that the document was not a will, but only a power to adopt a son, not conferred by a will within the meaning of S. 17 of the Registration Act, 1877.

The references to property that occur in the document are no more consequences of the guardianship of the wife and the character of being a will is not established independently of these

Jagannatha Bheemia Deo v. Kunja Behari Deo. (P. C.) ... 648

Religious Endowment—Office of Shiebat—Grounds for removal—Incapacity of trustee to purchase trust estate—Not confined to case of trustee for sale—Basis of the rule—Secret purchase by trustee—Never permissible.

The grounds for removing a Shiebat from office may not be identical with those upon which a trustee would be removed in England, but if a Shiebat in the exercise of his duties has put himself in a position which precludes him from faithfully discharging the obligations of the office, that is sufficient ground for his removal.

A trustee, if not a trustee for sale, can acquire an estate from beneficiaries who are sui juris, but only if he has made the fullest disclosure to them of all facts within his knowledge as to the value and condition of the estate and the parties are arm's length, otherwise the purchase is bad. The basis of the rule is that a person occupying a fiduciary relation may not use for his own benefit information which he has acquired as to the trust estate

(1908) 1 Ch. 545, approved.

Even if a person in a fiduciary position is otherwise entitled to purchase, yet if he effects the purchase secretly in another person's name such purchase can never be allowed to stand.

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Raja Peari Mohan v. Monothar Mukerji 68

—*South Canara—Pattams—Nature of—Claim for maintenance of junior members of Aliyasantana family out of pattam properties—Conversion of pattam property into family property—Legality of.*

Junior members of an Aliyasantana family to which a pattam holder belongs have no interest in the pattam properties and cannot claim to be maintained out of the income of such properties.

Per *Sadasiva Iyer, J.*—A pattam South Canara is in some respect analogous to the stanom in Malabar. But unlike a stanom, it is not a mere dignity to which no obligations or duties are attached. It partakes of the nature of an office to which the villagers appoint after elaborate ceremony a member of the Aliyasantana family to which the last holder belonged and if none such exists, anybody they like. The duties of the office are defined and entail expenses out of the income derived from the pattam properties.

Per *Spencer, J.* An appropriation or conversion for private purposes of properties attached to the pattam office is illegal.

37 M. L. J. 698 Referred to.

(*Sadasiva Iyer and Spencer, JJ.*) *M. Nagaraja v. Deva Raja Kainanthaya Bellala* 340

Specific Relief Act, S. 15—Specific performance—Agreement to sell an item of joint family property—Agreement not binding on the other members—Whether agreement falls under the terms of S. 15—Terms of which specific performance will be decreed.

A co-parcener who agrees to convey an item of family property for purposes personal to himself and not binding on the other co-parceners cannot perform his contract in its entirety within the meaning of S. 15 of the Specific Relief Act and the case therefore falls within the operation of the first portion of that section. L. L. R. 26 Mad. 74 and 32 Mad. 320 overruled.

In such a case, specific performance can be decreed only if the plaintiff is willing to take a conveyance of the share of the co-parcener on the date of the contract and is willing to pay the full amount of consideration.

33 Mad. 359 and 37 Mad. 387 approved.

(*Sir John Wallis, C. J., Oldfield and Kumaraswamy Sastri, JJ.*) *Baluswami Iyer v. Lakshmana Iyer and others* 129

—**S. 42—Hindu Law—Reversionary right—Declaration of grant of—Declaration merely incidental to declaration of validity of adoption of alleged last male owner—Effect.**

Plaintiffs, the sons of one of two brothers sued the widow and daughter of the other, for a declaration that P was the validly adopted son of their uncle, that they (plaintiffs) were the reversionary heirs of P and that an alienation made by the widow of their uncle was not binding upon them. The widow plaintiffs alleged acting in collusion with her daughter denied the validity of P's adoption. The courts below found that the alienation by the widow was valid, but nevertheless granted the other declarations prayed for. Held, that the denial by the widow of the truth and validity of P's adoption being a daughter to the suit to establish the adoption was maintainable under S. 42 of the Specific Relief Act and that the Plaintiffs were entitled to the incidental declaration that they were the presumptive reversioners of P.

(*Phillips and Odgers, JJ.*) *Latchamma v. Appanna* 386

Transfer of Property Act, Ss 48, 52 and 101—Lis pendens—Execution of mortgage-deed before institution of suit—Registration pendente-lite—Effect of—Mortgage—Prior and subsequent—Suit on prior mortgage without impleading puisne mortgagee—Decree—Rights of purchaser of a portion of the mortgaged property in execution sale—Partial payment of the decree on the prior mortgage—Subrogation—Rights of mortgagee from purchaser.

A second mortgagee executed before but registered after, the institution of a suit on the first mortgage, is not affected by the doctrine of *lis pendens*. The second mortgage though registered during the pendency

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of the suit on the first mortgage takes effect from the date of its execution. If the first mortgagee obtains a decree and sells the mortgaged property in execution without impleading the second mortgagee as a party to the suit, the rights of the latter under his mortgage are not affected.

5 Pat. L. J. 715 not followed.

32 I. C. 431 followed.

21 M. L. J. 213 relied on.

A prior mortgagee sued on his mortgagee and obtained a decree for sale without being aware of, and therefore without impleading the puisne mortgagee as a party to the suit. In execution of the decree an item of the mortgaged property was sold and with the purchase money, a portion of the decree amount was paid off. The purchaser at the execution sale in his turn mortgaged that item to the defendant to secure moneys already borrowed by him for the purpose of depositing the purchase money at the Court sale. The defendant obtained a decree on his own mortgage, executed it and purchased the rights of his own mortgagor in the item mortgaged to him. Subsequently in a suit by the puisne mortgagee to enforce his mortgage, the defendant pleaded that he was entitled to a prior charge on the item sold in execution of the decree on the first mortgage, to the extent to which that decree was satisfied.

Held (1) that the purchaser at the execution sale having released the item purchased by him from all liability under the decree on the prior mortgage was entitled to a prior charge on that item in respect of the moneys paid by him towards the decree on the prior mortgage;

(2) that notwithstanding the fact that the prior mortgagee had a decree on his mortgage and sold the property in execution thereof, it was open to the purchaser to hold his right to the prior charge as a shield against the puisne mortgagee in the suit by the latter to enforce his mortgage; 41 Mad. 513, 41 All. 455; 42 All. 364. Relied on. 40 All. 407 distinguished.

(3) that the right of the defendant to hold the prior charge as a shield was not affected by limitation;

(4) that the purchaser had not a general right of subrogation by reason of the fact that he had paid off a portion of the decree on the prior mortgage; 35 Mad. 183; 29 I. C. 511; 38 Mad. 548, 38 All. 542 referred to.

but (5) that the defendant being a mortgagee from the purchaser was entitled to avail himself of the rights which his own mortgagor had in that particular item of the mortgaged property which was freed from all liability by the purchaser including the right of priority as aforesaid.

(Sadasiva Iyar and Spencer, JJ.) *Venkataramana Reddi v. Rangiah Chetti.*

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—S. 50—Mortgage—Attestation—Proof—Quantum—Examination of one attesting only if enough—Evidence Act, Ss. 68, 69—Effect—Attesting witness—Proof by favourable answers—Effect.

To prove that a mortgage deed has been duly "attested" as required by S. 59 of the Transfer of Property Act, it is not enough to call one attesting witness to speak to the execution of the deed. It is necessary also to prove that the deed has been attested by a second witness as required by that section. 39 All. 109; 39 All. 241; 39 M. L. J. 463, dissenting from.

All that Ss. 68 and 69 of the Evidence Act do is to impose a particular mode of proof and to require that certain documents shall be proved in a particular way, and in no other, that is to say, if one attesting witness is alive, execution and attestation cannot be proved by other witnesses, though they may be available and, if no attesting witness is available, execution and attestation cannot be proved by other evidence, without proving that the attestation of one attesting witness at least is in his handwriting. Those sections do not have the effect of dispensing with

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the necessity of proving that the deed is attested by at least two witnesses as required by S. 59 of the T. P. Act.

Where, in a case which one only of the attesting witnesses was alive, the mortgagee called him to prove the execution and attestation of the mortgage deed, and he, in his examination-in-chief, spoke to the execution of the deed and its attestation by him, but having been got at by the opposite side, gave answers in his cross-examination which would put plaintiff (the mortgagee) out of court so far as proof of execution and attestation was concerned, and the plaintiff himself spoke to the handwriting of another attesting witness, *held*, that the mortgage deed had been duly proved.

(*Sir John Wallis, C. J. and Krishnan, J.*) *Thamernu Gangayya v. Bommadevara Subbamma and others.* ... 305

— **Ss. 54 and 134—Transfer of a mortgage debt—For malities**

A mortgage debt can be validly transferred only in accordance with the provisions of S. 54 of the Transfer of Property Act 40 M. L. J. 25 Relied on.

(*Sadasiva Iyer and Nageswari, JJ.*) *The Official Receiver, Trichinopoly v. Lakshmana Iyer.* ... 453

— **S. 55 (2)—Transfer of a mortgage debt—Covenant for title—Breach—Damages—Contract to contrary.**

In a transfer of a mortgage debt there is an implied covenant for title under S. 55 (2) of the Transfer of Property Act. If the debt is found to be fictitious, the transferee can sue the transferor for damages for breach of the covenant for title. 29 M. L. J. 454 Dissented from.

44 Mad. 196 Relied on

A specific covenant, to oust the implied covenant for title contained in S. 55 (2) of the T. P. Act, must relate to the same subject matter as that referred to in the implied covenant. 39 M. L. J. 449 referred to.

(*Phillips and Odgers, JJ.*) *Batagurumurthy Chetty v. Ramakrishna Chetty and others* ... 467

— **Ss. 58 (d), 98—Usufructuary Mortgage—Anomalous mortgage—English mortgage—Distinction—Test—Usufructuary mortgage with a clog on equity of redemption—What amounts to.**

Where the material portion of a mortgage deed was to the effect:—
“ We have borrowed from you Rs. 1,000. We have put you in possession of the 8 acres 25 cents of land comprising . . . towards the yearly interest of Rs. 80 at 8 per cent and the taxes payable to circar. Whatever might be the profits received from the said lands in every year they shall be taken in payment of interest aforesaid and the taxes on the lands, you shall enjoy the profits from the said lands without having anything to do with the increase or decrease. You need not receive the said principal sum of Rs. 1,000, even though we should pay you the same, within 5 years from the current year. It is settled that in case we should pay afterwards at one and the same time the said Rs. 1,000 on the 15th Chitrai, Sudham of any year, you should give up our land to us. If the principal sum be not paid within 20 years from this date you shall treat and enjoy these lands as having been sold to you absolutely ” *Held*, that the mortgage was merely a usufructuary mortgage with a clog on the equity of redemption and neither an English nor an anomalous mortgage.

The mortgage does not cease to be usufructuary merely on account of the addition of a term providing for irredeemability within 5 years.

(*Oldfield and Ramesam, JJ.*) *Vadappathi Narayanamurthy v. Appalanarasimhulu and another* ... 568

— **Ss. 80 and 74—Mortgage—Redemption—Effect on lease created by mortgagee—Possession of lessee if adverse.**

When a mortgage is redeemed the rights of a lessee from the mortgagee *ipso facto* come to an end. Thereafter the lessee holds the property

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only as trespasser, unless a fresh tenancy is created either expressly or by implication from the conduct of the parties. This holds good whether the redemption is at the instance of the mortgagor or a pusine mortgagee.

44 I C. 839, 844. 3 A. L. J. 517 Referred to.

2 L. W. 1182 Distinguished.

(*Krishnan and Odgers, JJ.*) *Alagiriswami Mudali v. Akkulu Naidu* ...

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—Ss. 63 and 70—Mortgage—Accretion—Acquisitions after passing of decree on mortgage, if pass to the auction purchaser—Possessory title—User.

Ss. 63 and 70 of the Transfer of Property Act must be read together and under both sections the accession to the mortgaged property must be received during the continuance of the mortgage, if it is to form part of the mortgaged property.

Where acquisitions are made by a mortgagor after a decree for sale has been passed and the mortgaged property sold in execution there is no equity in favour either of the mortgagee or of the purchaser at the court auction to have such acquisitions taken away from the person who paid for them and attached to the property already sold under the decree. For, at the time they were acquired the mortgage interest had ceased to exist.

A mere user which has not ripened by prescription would not give rise to any right upon which an action could be founded unless some kind of possessory title existed in the plaintiff's favour.

(*Spencer and Ramesam, JJ.*) *Sivananjiah v. Sithay Goudar* ...

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—S. 79—Partition deed—Provision that family debts should be discharged by respective sharers as per schedule—Such sharer's properties to be liable on default—Mortgage by one of the sharers of his share after partition—Decree for a family debt against all members—Priority of charge created by a partition deed—Decree debt not paid by other members—Declaration—Construction of document—Charge or mortgage.

The partition deed between the plaintiff's the 2nd defendant and three other persons, brothers provided that "the common family debts should be discharged by the respective sharers to whom they fell, as per schedule of the document, and that, if any sharer failed to discharge accordingly, such sharer's properties should be liable for such debts and for the losses that might happen to the family." The 2nd defendant not having discharged a debt due by him under the partition deed a decree was obtained against all the brothers by the creditor. The plaintiffs having brought a suit for declaration that under the terms of the partition deed a mortgage right has been created in their favour to the extent of the decree amount and that right had priority over a hypothecation executed by the 2nd defendant in favour of the first defendant on some of the properties that fell to the share of the second defendant after the partition, held, that the plaintiffs were entitled to the declaration claimed even though they had not paid the decree amount to the creditor.

The case is one governed by S. 79 of the Transfer of Property Act and that partition deed creates a mortgage or charge, as is contemplated by S. 79 and when the liability attaches on the payment of the decree debt it is enforceable in accordance with its terms.

26 Mad. 322 : and 39 Mad. 288 distinguished.

The above provision in the partition deed is not one which merely emphasises their personal liability of the sharer to pay the family debts but creates a mortgage or charge upon his property.

(1917) M. W. N. 533 followed.

(*Oldfield and Ramesam, JJ.*) *T. A. Sesha Aiyar v. S. N. Srinivasa*

Iyer:

... 882.

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—Ss 108 (h) and 111—*Forfeiture—Expression of intention to determine the lease—Time for removal of buildings erected by tenant—Power of Court to grant.*

A notice given by the landlord to his tenant unequivocally expressing his intention to determine the lease on the ground of forfeiture, is a sufficient compliance with S. 111 of the Transfer of Property Act. 2 L. W. 946 Referred to.

Semble. In a proper case, a tenant may be allowed a reasonable time after the expiry of the tenancy for the removal of buildings erected by him

(*Phillips and Odgers, J.J.*) *Thacharakavi Manavikraman v Noor Mohamed Sait* ... 265

Trustee—Delegation of duty by—Validity Appointment and dismissal of hereditary temple servants—Delegation of power of.

The power of a appointment and dismissal of hereditary temple servants who cannot be dismissal (without sufficient cause such as grave misconduct being established) is not one of the powers of a trustee which are capable of being delegated to an agent. 16 Mā 73 referred to.

(*Sadasiva Iyer and Napier, JJ.*) *Parasurama Udayan v. Tirumal Row* ... 17

Trusts Act S. 43—Sole acting trustee—Powers of compromise of—Indian Limitation Act, Art 91—Limitation for a suit to recover possession of the property granted under undue influence—Cause of action when arises—Gift of a village by an extravagant Zemindar to a person formerly his mother's servant and subsequently his own Secretary—Validity of—A Settlement of the Zemindar in trustee for his son—Compromise by the trustee giving a permanent lease to the servant on half the usual rent—Legality of.

In September 1894, the late Rajah of Ramnad leased a village in the Zemindari for forty years to the 1st defendant who was for several years a trusted servant of his mother and who was subsequently his own vernacular secretary. In June 1895 he gifted the village as a religious gift on the second monthly ceremony after his mother's death to the 1st defendant with full powers of gift sale etc.. Under a settlement deed of July 1895 the late Rajah settled the Zemindari on his eldest son, the present plaintiff, constituting one Venkataranga Aiyar as Dewan Trustee under the settlement. In April 1902, the trustee under the settlement deed and the 1st defendant agreed, after a threat by the trustee to set aside the gift deed; that the 1st defendant should hold the village on perpetual lease on half the usual rent thus altering the gift with full ownership right in the village to a grant of a perpetual, heritable occupancy right on favourable rent. The late Rajah died in 1903 and the plaintiff brought this suit in 1913 within three years after his attaining majority to recover possession of the village with mesne profits.

Held that the arrangement of compromise entered into by the Dewan Trustee 1902 was within the powers of the trustee under S. 43 of the Indian Trusts Act and valid and binding on the plaintiff.

The Dewan Trustee was a sole acting trustee within the meaning of S. 43 of the Indian Trusts Act.

If the instrument creating a trust authorises a sole trustee to execute the trusts and powers thereof, he is termed a sole acting trustee when he enters into an agreement of composition or other arrangement.

The gift made by the plaintiff's father was not one induced by undue influence

33 Cal. 773 followed.

19 Ch. D. 603; (1909) 2 K. B. 390 Referred to.

97 English Reports 22 distinguished.

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The effect of holding the compromise of 1902 as not binding on the plaintiff will be to revive effect of the gift deed made in June 1895.

2 Cal. 184 at page 11 Cal. L. J. 337 at page 343.

89 All. 179 followed.

The Plaintiff's suit set aside the gift deed is barred by Limitation under Art. 91 of the Limitation Act.

Per *Sadasiva Iyer*—The expression undue influence cannot be properly used unless either (1) confidence has been reposed on the person charged as where the latter is the solicitor, trustee guardian etc., or (2) unless the influence of the person charged is such that the other person stands in some sort of respect, awe or fear of him such as a child towards his parent or a pupil towards spiritual preceptor and so on, so that the idea of displeasing him by a refusal to submit to his wishes puts the other in fear of prospective injury to his moral or spiritual welfare and happiness. An ordinary servant or dependant does not ordinarily hold such influence over his master.

Assuming that the deed was brought about by undue influence, the suit by the plaintiff to recover possession would be governed by art. 91 of the Limitation Act as the plaintiff cannot obtain possession without setting aside the gift deed which is a void transaction, but only voidable.

15 Cal. 58 followed.

The limitation period runs from the time when the facts entitling the person to have the instrument cancelled or set aside becomes known to him. The late Rajah who executed the instrument having known the facts perfectly from the very day of execution the cause of action arose immediately in 1895.

The cause of action for a suit to set aside a transaction on the ground of undue influence does not arise only when the undue influence ceases.

38 Mad 321 at page 11 : 24 M. L. J. 591 referred to.

31 M. L. J. 362 distinguished.

The decision in 2 Agpur Law Reports 98 relied on by Rustomji and Mitra in their treatise on limitation, holding that the onus of proof is on the defendant to show that the plaintiff's knowledge arose more than three years before suit instituted from.

(*Sadasiva Iyer and Pencer JJ.*) *Raja Rajeswara Sethupathi v. Kuppuswami Iyer.* ... 474

Wills—Implied revocation. Testator disposing of property differently in the latter will—Intention sole guide—Later will not providing for the whole subject-matter of the first will immaterial—Legacies for the same objects in both the wills, if taken cumulatively exceeding the value of the estate, later will revokes the former.

Where a testator is died leaving two wills and an intention can be gathered from the terms of the later will to dispose of his property in a manner different from the dispositions in the former will, the earlier will stands revoked. The intention is to be the guide, and it does not matter if the second will does not provide for the whole subject matter of the first will.

Williams of Executors 10th Edition Vol. page 119. In the Goods of *Pelchells* (8 P & D 153) and *Lemoges v. Goddard* (L. R. 1 P. D. 57 at p. 62) and *Dempsey v. Lawson* (P. D. 98 at page 105) followed.

Where legacies are provided to the same persons in both the wills and if they are taken to be cumulative they would amount to more than the total value of the estate of the testator, revocation of the prior will, will be implied from the terms of the later will.

Chichester v. Quartrages (1895) P. 186 at page 189 and in the *Estate of Bryan* (1907) P. 121 followed.

(*dying, Offg. J. and Odgers, J.*) *Chinnappa Pillai v. Kailasam Pillai.* ... 661